THE "BEDROCK PRINCIPLE" THAT WASN'T: *ALLIANCE FOR OPEN SOCIETY II* AND THE FUTURE OF THE NONCITIZENS' EXTRATERRITORIAL CONSTITUTION

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INTRODUCTION

This Note provides a timely update on the current doctrine regarding the scope of the "noncitizens' extraterritorial Constitution," a phrase used here to describe the universe of contexts, if any, in which a noncitizen may raise a constitutional claim or defense in relation to conduct that occurred when they were outside of the United States.[1] Many readers may be surprised to learn that the Supreme Court even has a doctrine that considers whether to extend constitutional rights to noncitizens abroad.[2] However, the prospect is more plausible when considered in light of two developments in American legal history: since the late nineteenth century, the Court has gradually held that an increasing number of constitutional provisions apply to noncitizen within the United States; [3] then, after World War II the Court recognized for the first time that U.S. citizens possess some constitutional rights even when they travel abroad.[4] After the Court held

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1. The author uses the phrase throughout the Note for its relative concision, but the phrase has shortcomings. First, the phrase can be read to presuppose that noncitizens abroad possess at least some constitutional rights, but the law is unsettled on that issue. Second, the phrase's dryness can—but should not—bely the humanity or civic contributions of the noncitizen population. *See, e.g.*, Nicole Svajlenka, *Protecting Undocumented Workers on the Pandemic's Front Lines: Immigrants Are Essential to America's Recovery*, CTR. AM. PROG. (Dec. 2, 2020), https://www.americanprogress.org/issues/immigration/reports/2020/12/02/493307/protecting-undocumented-workers-pandemics-front-lines/ [https://perma.cc/N6VN-H7MB] (demonstrating that a person's civic contributions to the United States may not necessarily turn on their citizenship status).

2. *See* Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 607 (2019) ("[T]he general public presumes that non-citizens do not share the same rights as citizens."). *But see* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?* 25 T. JEFFERSON L. REV. 367, 367–68 (2003) (arguing that the presumption is misguided).

3. By 1953, the list included the First, Fifth, and Sixth Amendments, as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses. Veneziano, *supra* note 2, at 602 n.17. This trend, known as "the 'aliens' rights tradition," involved "cases that appl[ied] heightened scrutiny to government action and affirm[ed] the status of noncitizens as 'persons' protected under the Constitution." *Affirmative Duties in Immigration Detention*, 134 HARV. L. REV. 2486, 2486–87 (2021); *see, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down state law banning undocumented noncitizens from public school under the Equal Protection Clause). *Compare* Matthews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of [noncitizens] within . . . [U.S.] jurisdiction . . . . The Fifth Amendment . . . protects every one of the[m] . . . from deprivation of life, liberty, or property without due process of law. Even one whose presence . . . is unlawful, involuntary, or transitory is entitled to that . . . ."), *with* Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973) (noting noncitizens lack constitutional rights to vote and hold office).

4. Reid v. Covert, 354 U.S. 1, 5 (1957) (plurality opinion); *see also* Thomas B. Moorhead, Reid v. Covert *and Its Progeny: The Practical Problem of Punishment*, 12

that the Constitution could reach beyond U.S. borders for citizens, a bright-line rule categorically barring its reach to noncitizens abroad became harder to justify given the extensive constitutional rights that noncitizens possess when they are within the United States.[5]

Since then, noncitizens abroad have sought to invoke the Constitution in many instances. Often, judges have declined to hold that the constitutional provision at issue was available, such as when a group of English women objected to the constitutionality of U.S. missiles being deployed near London close to their homes,[6] or when the Belgian son of a Hezbollah financier challenged his Treasury Department designation as a terrorist under the Due Process Clause.[7] Other noncitizens, however, have prevailed. When U.S. officials accidentally let a Filipino man buy radar equipment at a U.S. base surplus sale and embargoed him from reselling it, the man sued under the Takings Clause and obtained just compensation.[8] More recently, U.S. courts let a Malaysian national, placed on a "No-Fly List" and unable to return to her graduate program at Stanford University from abroad, seek injunctive relief under both the First and Fifth Amendments.[9]

The Supreme Court has never provided comprehensive guidance on how courts should decide whether a constitutional provision reaches a noncitizen in cases like these;[10] however, the Court's landmark decisions on the subject permit a few observations. First, when a *noncitizen* seeks to invoke a constitutional protection *extraterritorially*, a court should typically conduct a threshold inquiry into whether the constitutional claim or defense is available to the noncitizen before proceeding to analyze its

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SYRACUSE L. REV. 18, 21 (1960–61) (compiling post-*Reid* cases extending constitutional rights to citizens abroad).

5. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 965 (1991).

6. Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1332, 1334 (S.D.N.Y. 1984), *aff'd* 755 F.2d 34 (2d Cir. 1985).

7. Bazzi v. Gacki, 468 F. Supp. 3d 70, 73, 82 (D.D.C. 2020).

8. Turney v. United States, 115 F. Supp. 457, 458–62, 465 (Ct. Cl. 1953).

9. Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 987, 997 (9th Cir. 2012).

10. *See* José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1660 (2009) ("Despite nearly two centuries of decisions on this issue, the law remains unsettled, and no framework for analyzing these claims is clearly defined, much less well established."); Veneziano, *supra* note 2, at 605 ("[C]ourts are still struggling to answer [this] question of how far constitutional provisions should extend . . . ."); Neuman, *supra* note 5, at 990 (noting the "Court's continuing inability [throughout U.S. history] to settle upon a single perspective toward the persons, places and circumstances to which constitutional rights apply"); Hon. Karen N. Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 830 (2013) ("[T]he jurisprudence remains far from well defined and many important questions regarding the Constitution's territorial reach remain undecided.").

substance.[11] Second, for the purposes of triggering this inquiry, "noncitizen" encapsulates any person who lacks full U.S. citizenship.[12] Third, while the Court's understanding of when a claim becomes "extraterritorial" for the purposes of this doctrine is relatively unclear, it likely includes at least most claims or defenses relating to conduct that took place when a noncitizen was not physically-situated within de jure U.S. borders.[13]

For cases with these triggers, two landmark Supreme Court cases are generally understood to provide frameworks that judges may use to decide whether the noncitizens' extraterritorial Constitution reaches the facts of the case. In 1990, a plurality of the Court held in *United States v. Verdugo-Urquidez* that noncitizens "receive constitutional protections when they have . . . developed substantial connections with" the United States.[14] The opinion has since been interpreted as endorsing "membership theory" of the Constitution's scope,[15] which may enable noncitizens who have voluntarily established "substantial connections" to the United States, such

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11. *See* Mai v. United States, 974 F.3d 1082, 1100 (2d Cir. 2020) (Vandyke, J., dissenting) (describing the Supreme Court's "all-or-nothing approach to delineat[ing] the scope of individuals included in a constitutional protection," preceding any "scrutiny" of a right's "substance").

12. The Court uses 'noncitizen' interchangeably with related terms. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("noncitizens"); *id.* at 732 ("aliens"). Thus, the category "noncitizen" should be understood to refer to diverse groups of people for the purposes of this doctrine, even though colloquially the term connotes only immigrants. Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Law*, NBC NEWS (Jan. 22, 2021), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 [https://perma.cc/U894-E8MG]. *Compare Affirmative Duties in Immigration Detention*, *supra* note 3, at 2486 n.7 (explaining that "'[a]lien' is a statutory term used in U.S. immigration laws to refer to a noncitizen person and was once in widespread usage among scholars and practitioners," which "has since been criticized for its negative and dehumanizing connotations"), *with* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020) ("If an alien is inadmissible, the alien may be removed.").

13. In general, extraterritoriality is the subject of when U.S. law applies to claims arising from conduct "at least partially outside [of U.S.] territory." CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 167 (2d ed. 2015). This Note focuses on the Court's doctrine for when U.S. constitutional law applies extraterritorially. For further analysis of what "extraterritorially" means in this context, see *infra* Part III.B.1.

14. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (plurality opinion); *id.* at 271–72 (holding the Warrant Clause did not apply extraterritorially for a noncitizen who lacked ties to the United States).

15. Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851, 868 (2010) (stating that membership theories "limit[] the applicability of rights to privileged persons").

as permanent residents, to retain certain constitutional rights when they travel abroad.[16]

In 2008, the Court held in *Boumediene v. Bush* that Guantanamo Bay detainees had the right to challenge their confinement under the Suspension Clause despite their de jure presence in Cuba by weighing three "practical concerns".[17] In doing so, the Court appeared to reject membership theory in favor of a "global due process" approach to the Constitution's scope, which maintains that the Constitution can reach anyone in any place,[18] but that "certain rights have narrower or nonexistent applicability abroad, depending on the circumstances."[19] To determine whether circumstances enable a noncitizen to invoke a constitutional provision, global due process theory requires that courts balance factors that support and oppose the extension of the right,[20] with the latter set prone to include concerns about courts interfering with the political branches' authorities over matters of foreign policy and immigration.[21] A

16. For further discussion, see *infra* notes 91–96 and accompanying text; *infra* Part II.B.2.

17. *See Boumediene*, 553 U.S. at 759–64 (identifying the central role of "practical concerns" in the Supreme Court's key cases on whether to extend a constitutional right to a noncitizen abroad); *id.* at 766 (determining that "at least three factors are relevant" to whether noncitizen detainees could invoke the Suspension Clause at Guantanamo, de jure Cuban territory, prior to holding that the Clause reached the detainees on the basis of those practical concerns). *See infra* notes 75–82 and accompanying text.

18. It is thus a subset of globalism, which views "the Constitution as . . . the creation of a government whose powers are limited no matter where or against whom they are exercised." Falkoff & Knowles, *supra* note 15, at 869.

19. *Id.* at 869; Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 365 (2009). Neuman explains why *Boumediene*, and its interpretation of the Court's prior decisions on the bounds of the noncitizens' extraterritorial Constitution, show that the Court endorsed a "global due process" to constitutional extraterritoriality, even for noncitizens, but notes many questions persisted thereafter. *Id.* at 373–75 (describing global due process); *id.* at 375–77 (raising questions about what global due process entails).

20. *See* Neuman, *supra* note 5, at 919–20 (noting how global due process can be appealing framed as a "brand of harmless universalism" insofar as it "recognize[s] constitutional rights as potentially applicable [to noncitizens] worldwide" but enables courts to "balance them away" in the interest of U.S. foreign policy).

21. The Court's decisions often grapple with the degree of deference to afford the political branches in cases implicating their enumerated foreign affairs powers. *See infra* Part III.A. The Court has also held that that the other branches possess "inherent" plenary powers: Congress over immigration, and the Executive over foreign relations. Mac LeBuhn, *The Normalization of Immigration Law*, 15 NW. J. HUM RTS. 91, 94 (2017). Recognition of a noncitizen's extraterritorial right under the Constitution will likely implicate these powers, since such a case typically involves a challenge to U.S. Government conduct abroad, and, if it took place near the U.S. border, probably involves immigration. Decisions bounding the noncitizens' extraterritorial Constitution are especially hard to square with the Court's "entry fiction" doctrine, positing that, out of

massive body of scholarship on *Boumediene*, near-uniformly written by global due process advocates, appropriately reads the Court's use of a balancing test based on "practical concerns" as the Court's embrace of global due process,[22] even as lower courts have resisted that conclusion.[23]

The Note is the first in-depth assessment of the doctrine's current state after the Court decided *USAID v. Alliance for Open Society International, Inc.* ("*AOSI II*") in June 2020.[24] *AOSI II* was an unlikely vehicle for the Court to opine on the scope of the noncitizens' extraterritorial Constitution: while the relief sought in the case would have barred U.S. agencies from imposing a funding requirement on foreign-incorporated NGOs, the case was brought by American NGOs suing to vindicate their own First Amendment rights; no foreign NGOs were parties.[25] Regardless, the Court addressed the doctrine when it denied relief on the basis that:

> [It] is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution . . . [unless they are] in "a territory" under the "indefinite" and "complete and total control" and "within the constant jurisdiction" of the United States . . . .[26]

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respect for Congress' immigration powers, "a noncitizen at a port of entry is treated as if stopped at the border, even if the port of entry is located physically within the geographic territory of the United States." Ahilan Arulantham & Adam Cox, *Immigration Maximalism at the Supreme Court*, JUST SEC. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court/ [https://perma.cc/PMA8-YVMB]. At a minimum, this doctrine poses a conceptual challenge to the Court's use of the border as a line to demarcate where noncitizens' rights within the United States end and the noncitizens' extraterritorial Constitution begins. Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 793 (2020); *see infra* notes 196–99 and accompanying text (suggesting, for choice of law, that may be the line); *supra* note 3 and accompanying text (describing how noncitizens have had constitutional rights while physically-present in the United States for a century).

22. A cursory review of the post-*Boumediene* literature readily demonstrates that most of the published literature on the subject is authored by globalists, arguing amongst themselves as to the relative propriety of different limiting principles for globalism. *See infra* note 88 and accompanying text (comparing proposals in early 2010s to refine *Boumediene*'s global due process approach); *infra* note 104 and accompanying text (comparing proposals to refine a hybrid *Boumediene* and *Verdugo-Urquidez* framework, a trend in the literature throughout the late 2010s).

23. *See infra* note 90 and accompanying text.

24. Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020) ("*AOSI II*"). The Court had previously decided a related case. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013) ("*AOSI I*").

25. For an in-depth description of the case's facts, *see infra* Part I.C.

26. *AOSI II*, 140 U.S. at 2082, 2086 (citing Boumediene v. Bush, 553 U.S. 723, 755–71 (2008)).

Skeptically, this Note abbreviates that proposition as the "bedrock principle[][,]" which is how the Court characterized it.[27] The Court also explained that the denial of the relief in the case would "correspond[] to historical practice regarding American foreign aid . . . ."[28] On the basis of these two arguments, the Court denied the American NGOs' requested injunction.[29]

To date, scholars have written very little about *AOSI II*'s implications for the noncitizens' extraterritorial Constitution. Some have noted in passing that the bedrock principle is antithetical to *Boumediene*'s embrace of global due process,[30] expressing a "hard-line view" of the Constitution's extraterritorial reach to noncitizens.[31] Others have suggested that the Court's assertion of the bedrock principle was dicta and should not be followed.[32]

It is unsurprising that scholars have written so little about the decision. The overwhelming majority of law professors who write about this topic support global due process,[33] and so these professors may not want to give any attention to *AOSI II*. Separately, the most plausible explanation for the Court's unfair reading of *Boumediene* in *AOSI II* is quite obvious: the Court decided *AOSI II* after Justice Kavanaugh, who on the D.C. Circuit had opposed recognition of constitutional rights for noncitizens abroad,[34] took the seat of Justice Kennedy, who voted with the Court's liberals in *Boumediene* and wrote the decision.[35] While thus

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27. *Id.* at 2086.

28. *Id.* at 2087–88. For further description of the second rationale, see *infra* Part III.A.

29. *AOSI II*, 140 U.S. at 2088.

30. *See infra* note 144 and accompanying text (explaining the argument and compiling examples of it).

31. HARV. L. REV. ASS'N, *First Amendment–Freedom of Speech–Extraterritoriality–Agency for International Development v. Alliance for Open Society International, Inc.*, 134 HARV. L. REV. 490, 490 (2020).

32. *See infra* notes 151–56 and accompanying text (explaining the argument and compiling examples of it).

33. *See supra* note 22 and accompanying text.

34. *See* Gerald L. Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/ [https://perma.cc/59YK-UCZR] (noting that "Kavanaugh . . . had participated with other D.C. Circuit conservatives in undermining *Boumediene* in later detainee cases."); Meshal v. Higgenbotham, 804 F.3d 417, 429–31 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (describing threat of terrorism to the U.S. homeland hyperbolically to justify doing so).

35. Justice Gorsuch also filled the late Justice Scalia's seat, but this succession was less likely to influence the total number of Justices opposed to a broad noncitizens' extraterritorial Constitution. *See AOSI II*, 140 S. Ct. 2092, 2092 (2020) (noting that Justice Gorsuch voted with other conservatives in *AOSI II*); Boumediene v. Bush, 553 U.S. 723,

understandable, the dearth of analysis on *AOSI II* has not served judges and lawyers, who have already begun to contest *AOSI II*'s impact on the noncitizens' extraterritorial Constitution.

In response, this Note offers an intervention: the first in-depth analysis of how *AOSI II* might implicate the broader doctrine for determining when noncitizens possess constitutional rights abroad. Part I locates *AOSI II* in its historical-doctrinal context, recounting the prevailing academic narrative of how the Court's doctrine gravitated towards global due process over time, and identifying a number of discrete legal issues that were unsettled after *Boumediene*. Part II then concretizes the ways in which *AOSI II* may have unsettled the doctrine: notably, despite the strong arguments for not applying *AOSI II*'s so-called bedrock principle in other contexts, some courts have begun to do precisely that, whereas the Second and Ninth Circuits have found discrete reasons to distinguish *AOSI II* in cases in which it could conceivably have been applied. Finally, Part III offers a novel interpretation of *AOSI II*, examining how the Court's second justification for its holding in *AOSI II*—an analysis of the political branches' historical practice in foreign aid—may support the extension of constitutional rights to noncitizens abroad in several other types of cases. With these contributions, the Note provides the first holistic insight into the state of the noncitizens' extraterritorial Constitution at a critical juncture for the doctrine.

I. The Flimsy Foundations of *AOSI II*'s "Bedrock Principle"

Part I contextualizes *AOSI II* in a broader account of how the Court has thought about the noncitizens' extraterritorial Constitution over time. Part I.A presents the prevailing academic narrative in which the Court's commitment to strict territorialism eroded in the twentieth century, culminating in the Court's explicit reliance on a global due process theory in *Boumediene*. Part I.B then catalogues the raft of doctrinal questions that were unsettled in the dozen years after *Boumediene*. Lastly, Part I.C examines the Court's latest statement about the noncitizens' extraterritorial Constitution: *AOSI II* and the purportedly-bedrock principle on which it rested.

833, 834, 843 (2008) (Scalia, J., dissenting) (criticizing Justice Kennedy's decision in *Boumediene*).

A. The Emergence of a Noncitizens' Extraterritorial Constitution

Under the prevailing account, the Court did not recognize extraterritorial rights under the Constitution until the past century.[36] Scholars attribute the reluctance to a robust commitment among American jurists to international comity, the idea that nations should not apply their laws outside of their own borders to respect the jurisdiction of other nations' courts.[37] On this premise, a philosophy imposing strict territorial limits upon the Constitution's reach "prevailed as dogma for most of [U.S.] constitutional history . . . ."[38] At the same time, the Court gradually held that more and more constitutional provisions protect noncitizens when they are *within* the United States.[39]

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36. Neuman, *supra* note 5, at 918; *see infra* note 37 (compiling cases illustrating the Court's tradition of strict territorialism). Recent research has unearthed evidence that the Founding generation may have supported U.S. constitutional rights for noncitizens abroad, complicating that narrative. *See* Nathan Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 413–37 (2017) (noting Founding-Era due process guarantees may have applied to federal law enforcement operations against noncitizens abroad); Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787-1792*, 89 FORDHAM L. REV. 1895, 1898, 1916, 1922, 1927 (2021) (arguing that the allocation of federal courts' jurisdiction in Article III and the First Judiciary Act reflect a "distinct" Founding-era "favoritism for foreign litigants . . . over American [ones]," such as providing for Supreme Court jurisdiction over constitutional claims by noncitizens against U.S. States); Joshua J. Schroeder, *We Will All Be Free or None Will Be: Why Federal Power Is Not Plenary, But Limited and Supreme*, 27 TEX. HISP. J.L. & POL'Y (forthcoming 2021) (manuscript at 20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707753 [https://perma.cc/SU47-V7LT] (arguing that the "principle that people do not have constitutional rights outside the borders of their nation" was a "royal principle . . . originally set forth . . . by Lord Mansfield to oppress America") (citations omitted).

37. *See* Neuman, *supra* note 5, at 918; Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (holding that the Sherman Act did not apply to "conduct" outside of U.S. territory, even if it would promote a U.S.-centric policy and all parties were American); Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."). On this logic, the Court displayed conceptual cogency when it upheld constitutional protections for noncitizens' U.S.-based property while the owner was abroad, but refused to recognize extraterritorial constitutional claims brought by noncitizens and citizens alike. Neuman, *supra* note 5, at 915 n.20; Russ. Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (noncitizens); *In re* Ross, 140 U.S. 453, 464 (1891) (citizens); *see also id.* (relying on Framers' original intent for strict territorial view of the Constitution's scope); Neuman, *supra* note 5, at 915–16, 915 n.19 (observing that, while *Ross* was the first occasion where the Court explicitly decided a case in this way, it "had never suggested a contrary holding before").

38. *See* Neuman, *supra* note 5, at 918.

39. For a more detailed account, see *supra* note 3 and accompanying text.

At the turn of the twentieth century, the Court first extended constitutional rights beyond de jure U.S. borders in the *Insular Cases*. These cases raised the question of whether the Bill of Rights applied in territories that the United States occupied after the Spanish-American War.[40] This was first time "sizable populations were taken under [the American] flag with no wide anticipation that they would ever be accepted into statehood."[41] Ultimately, the Court decided to extend the full Bill of Rights in "incorporated Territories" (those on track for statehood) but only some provisions in "unincorporated Territories" (those that Congress did not intend to ever grant statehood).[42] Scholars today "excoriate[]" this dichotomy as a "suspect and racist" device used to legitimate the assertion of U.S. sovereignty over unincorporated territories while withholding fundamental liberties from them.[43] At the same time, many view the extension of rights to the unincorporated territories as a progressive rejection of territorialism precisely because there were no plans for these regions to ever receive full membership as a part of the United States.

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40. The *Insular Cases* are a series of decisions reached at the turn of the twentieth century whose "reasoning has long influenced the Supreme Court's understanding of the reach of the Constitution and the limits of federal power outside of the territorial United States." Falkoff & Knowles, *supra* note 15, at 872; Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 264 n.15–16 (2009); *see also* Christina Ponsa-Kraus, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 975, 975 n.4 (2009) (compiling a list of views as to which cases handed down between 1901 and 1922 merit the label and identifying a "nearly universal consensus" that *Balzac v. Porto Rico*, 42 S. Ct. 343 (1922), culminates the series but notes disagreement on the full list, which ranges proposed from six to thirty-five cases).

41. GEORGE F. KENNAN, AMERICAN DIPLOMACY 15 (2012 ed.).

42. This approach was introduced in Justice White's concurrence in *Downes v. Bidwell*, reasoning that the Constitution's application in each territory was "self-evident" and raised only the question of "whether the specific constitutional provision . . . [was] applicable." Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring); Boumediene v. Bush, 553 U.S. 723, 757 (2008). The majority asserted the contrary position that the Constitution must be "extended" to a given territory by Congress to have effect. *Downes*, 182 U.S. at 286, 278–79, 287. Later decisions in the *Insular Cases* followed Justice White's concurrence in *Downes*. Ponsa-Kraus, *supra* note 40, at 975.

43. Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1660–64, 1662 n.128 (2021); *see* Ponsa-Kraus, *supra* note 40, at 991–92 (describing the incorporated-unincorporated distinction as inappropriately formalistic and artificial); Neuman, *supra* note 19, at 378 (similar); Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 68 (2013) ("[A] definite tinge of racial bias is discernible in several of the plurality opinions. This is not a surprising circumstance considering that the Justices that decided the Insular Cases were, almost to a man, the same that decided the infamous 'separate but equal' case of *Plessy v. Ferguson* . . . .").

The Court opined on the bounds of the noncitizens' extraterritorial Constitution again in 1950 in *Johnson v. Eisentrager*.[44] The action was brought by German spies who were captured in China after the Nazi surrender and then detained in Europe; they challenged their detention under the Suspension Clause and other constitutional provisions.[45] A 6-3 Court rejected their claims in a decision that relied heavily on territorial logic.[46] In fact, the Court barely engaged with how the *Insular Cases* had untethered constitutional rights from U.S. soil.[47] For global due process proponents, *Eisentrager* is nonetheless consequential because the Court analyzed factors other than the territorial status of the detention site, such as the military burden if U.S. troops had to return home to attend the detainees' legal proceedings.[48] In this respect, the Court's decision in *Eisentrager* may have presaged the Court's later use of a balancing framework in *Boumediene*.[49]

Arguably, the Court's later embrace of global due process flows much more directly from its 1957 decision in *Reid v. Covert*.[50] This is despite the fact that the plaintiffs in *Reid* were Americans: wives of U.S. soldiers, undergoing trials in military tribunals abroad, who invoked the Constitution to raise objections to the jury-less proceedings.[51] Six Justices voted to hold that the Fifth and Sixth Amendments barred the use of the military trials on these facts.[52] For globalists, the takeaway from *Reid* is that

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44. Johnson v. Eisentrager, 339 U.S. 763, 767 (1950).

45. *Id.*

46. *See id*. at 778 (rejecting the possibility that constitutional habeas relief could be granted to prisoners who "were all beyond the territorial jurisdiction of any court of the United States"); *see also id.* at 768 ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.").

47. The Court merely writes that "[n]o decision of this Court supports . . . [the] view" that the Fifth Amendment applies abroad with a "cf." to *Downes*—no pincite. *Id.* at 785 (citing Downes v. Bidwell, 182 U.S. 244 (1901)). *But see id.* at 763, 796–97 (Black, J., dissenting) (citing *Downes*, 182 U.S. 244).

48. Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 2 N.Y.U. ANN. SURV. AM. L. 369, 387 (2007); *see, e.g.*, Boumediene v. Bush, 553 U.S. 723, 762–63 (2008) ("The [*Eisentrager*] Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It 'would require allocation of shipping space, guarding personnel, billeting and rations' and would damage the prestige of military commanders at a sensitive time.") (quoting *Eisentrager*, 339 U.S. at 779).

49. For the Court's interpretation of *Eisentrager* in *Boumediene*, see *infra* note 72 and accompanying text.

50. Neuman, *supra* note 5, at 965; Reid v. Covert, 354 U.S. 1 (1957).

51. *Reid*, 354 U.S. at 3–5, 15–20 (plurality opinion).

52. Neuman, *supra* note 5, at 965.

a plurality of the Court sharply rebuked territorialism, proclaiming: "the United States is entirely a creature of the Constitution[,]" so it "can only act in accordance with all of the limitations imposed by the Constitution" wherever it acts.[53] Although Justice Black certainly had the constitutional rights of citizens in mind when he wrote the plurality opinion,[54] advocates of global due process (and the Court itself in *Boumediene*) still view *Reid* and its progeny as a turning point for the Constitution's reach to noncitizens abroad.[55] They reason that, because the rights of noncitizens resemble citizens' rights on U.S. soil,[56] the recognition of at least some extraterritorial rights for noncitizens abroad has been appropriate ever since *Reid* severed the territorial bound to the Constitution for citizens.[57]

In *Verdugo-Urquidez v. United States*, the Ninth Circuit rendered a decision articulating precisely that argument. On appeal, the court excluded evidence in the U.S. trial of a cartel leader under the Fourth Amendment's Warrant Clause—even though he was a Mexican citizen and U.S. agents had seized the evidence from his home in Mexico—on the combined authority of *Reid* and decisions that recognized noncitizens' Fourth Amendment rights within the United States.[58] The Supreme Court voted to reverse in 1990, but only after five of the Court's Justices authored separate opinions. In these opinions, each Justice adopted distinct "understanding[s] of constitutionalism", [59] a testament to how *Reid* demanded greater sophistication and range in thinking about noncitizens' extraterritorial

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53. *Reid*, 354 U.S. at 5–6 (plurality opinion). *Compare In re* Ross, 140 U.S. 453, 464 (1891) (expressing strict territorial view in seminal decision)*, with* Neuman, *supra* note 5, at 965 (stating that *Reid* "end[ed] the regime of strict territoriality" in holding citizens had rights abroad)*, and Reid*, 354 U.S. at 12 (plurality opinion) ("The *Ross* approach . . . has long since been directly repudiated by numerous cases.").

54. *See Reid*, 354 U.S. at 12 (plurality opinion) ("[R]eject[ing] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").

55. Neuman, *supra* note 5, at 918 (describing *Reid* as a sharp rebuke of the "strictly territorial" model for the Constitution's reach); Veneziano, *supra* note 2, at 614; Boumediene v. Bush, 553 U.S. 723, 726 (2008).

56. For a further description, see *supra* note 3 and accompanying text.

57. Neuman, *supra* note 5, at 965; *Boumediene*, 553 U.S. at 726.

58. The court explained that, since *Reid* imposed the Constitution's "substantive constraints on the federal government, even when it operates abroad," and since the Fourth Amendment protected noncitizens within U.S. borders, it was "difficult to conclude that Verdugo-Urquidez lacks these same protections" only because the search occurred in Mexico. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1218, 1223–24 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990) (citing Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion) (citations omitted)).

59. United States v. Verdugo-Urquidez, 494 U.S. 259, 259 (1990); Neuman, *supra* note 5, at 916–17. Justice Brennan's dissent, for example, sounds in both universalism and mutuality-of-obligation theory. *See id.* at 916 (universalism); *supra* note 225 and accompanying text (mutuality).

rights. Eventually, Justice Rehnquist's plurality opinion and Justice Kennedy's concurrence in *Verdugo-Urquidez* came to stand for the Court's two main approaches to the doctrine bounding the noncitizens' extraterritorial Constitution.[60]

For the plurality, the touchstone of the inquiry was whether the defendant had developed sufficient "voluntary connections" to the United States to invoke the Warrant Clause.[61] First, the plurality construed the Fourth Amendment and the Preamble's use of "the People" as evidence of the Framers' intent that the Warrant Clause would narrowly protect "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[62] Because the defendant was in the United States "for only a matter of days" and "had no previous significant voluntary connection," the plurality then reasoned that he could not have forged one, and so the Warrant Clause did not reach his case.[63]

Justice Kennedy arrived at the same conclusion, but on a different rationale.[64] He assumed that the Constitution can always constrain the Government wherever and against whomever it acts, but also recognized that its provisions do "not *necessarily* apply in all circumstances in every foreign place."[65] Thus, he reasoned that a court's task is to decide whether it would be "'impracticable and anomalous'" if a constitutional provision were

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60. Alan Mygatt-Tauber, *Rethinking the Reasoning of* Verdugo-Urquidez, 8 IND. J.L. & SOC. EQUAL. 240, 255 (2020).

61. *See* Marouf, *supra* note 21, at 778, 780 (noting that the opinion stands for a provision's reach turning on bright-line rules related to "'signs of belonging' like status (e.g., citizenship, immigration status) or location (being inside a sovereign's territory")).

62. *Verdugo-Urquidez*, 494 U.S. at 263–65 (plurality opinion) (citations omitted).

63. *Id.* at 271–72.

64. Oddly, he wrote that his views "do not depart . . . in fundamental respect from the Opinion of the Court, which [he] join[ed]." *Id.* at 275 (Kennedy, J., concurring). A comparison of the opinions suggests otherwise. *See* Neuman, *supra* note 5, at 972 ("Kennedy's concurring opinions diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed to be really speaking for a plurality of four.").

65. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring) ("The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms."); *id.* at 277 ("I take it to be correct, as the plurality opinion in *Reid* . . . sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic" (citation omitted)); *id.* at 277–78 (noting that various cases, including a seminal decision establishing the Executive's plenary power over foreign policy, "stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad" (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (citations omitted)).

to reach a noncitizen abroad on a case-by-case basis.[66] Justice Kennedy decided that it would be "impractical and anomalous" for the Warrant Clause to apply on the facts of *Verdugo-Urquidez* for a few reasons, such as Mexico's "'wholly dissimilar traditions and institutions[.]'"[67] In doing so, he relied upon the reasoning of global due process.

In 2008, Justice Kennedy revisited that logic in *Boumediene*—and this time, he wrote for the Court.[68] The case concerned whether Guantanamo Bay detainees could challenge legislation authorizing their detention under the Suspension Clause.[69] Because Guantanamo Bay is de jure Cuban territory, a key issue in the case was whether the Clause could "reach" the detainees.[70] On this issue, Justice Kennedy echoed his *Verdugo-Urquidez* concurrence, explaining that the Constitution's individual rights provisions are never inapplicable, but cannot always apply given the "inherent practical difficulties of enforcing all constitutional provisions

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66. *Id.* at 277–78 ("[T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions . . . are that would make adherence to a specific guarantee altogether impracticable and anomalous." (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); *id.* at 278 (explaining reasons why "[t]he conditions and considerations . . . [relevant in the case] would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous" on the facts).

67. *Id.* at 278.

68. Justice Kennedy contributed to a 5-4 majority comprised of himself and the four most liberal Justices who served on the Court at the time. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

69. *Id.* at 732–35. The Court had held against the Bush Administration twice in 2004 and again in 2006 for providing insufficient procedural protections to Guantanamo detainees without a statutory basis for doing so. Rasul v. Bush, 542 U.S. 466, 485 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 532–35 (2004); Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006). The law at issue in *Boumediene*, the Military Commissions Act of 2006 (MCA), was the Administration's attempt to obtain legislation from Congress to "override" the Court's decisions: the MCA broadly authorized the "detention, interrogation, prosecution and trials of terrorism suspects" at Guantanamo Bay. Emanuel Margolis, *National Security and the Constitution: A Titanic Collision*, 81 CONN. BAR J. 271, 271–72 (2007).

70. The Court addresses Guantanamo's legal status relatively early in its decision. Crucially, "Guantanamo is not formally part of the United States," and "under the terms of the lease between the United States and Cuba, Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control'" over it. *Boumediene*, 553 U.S. at 753 (citations omitted). While the lease gives "Cuba effectively . . . no rights as a sovereign until the parties agree to modification" of the lease "or the United States abandons the base[,]" the U.S. Government's stance was that "Guantanamo is not within its sovereign control." *Id.* (citations omitted). In *Boumediene*, the Court "accept[ed] the . . . Government's position that Cuba . . . retains *de jure* sovereignty over Guantanamo[,]" but "not[ed] . . . the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty . . . ." *Id.* at 755 (citation omitted).

'always and everywhere.'"[71] Refining the "impracticable and anomalous" test, the Court interpreted the *Insular Cases*, *Eisentrager*, and *Reid* as united by a "common thread[:]" that "extraterritorial questions turn on objective factors and practical concerns, not formalism."[72] On this basis, the Court raised three "practical concerns" to decide whether the Suspension Clause "reach[ed]" the detainees: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[73] After discussing the three factors, the Court held that the Clause reached the detainees.[74]

B. The Noncitizens' Extraterritorial Constitution After *Boumediene*

Part I.B catalogues the myriad doctrinal questions that emerged after *Boumediene*. The threshold question was whether the practical concerns approach had replaced *Verdugo-Urquidez*'s substantial connections test as the default framework for analyzing whether the noncitizen's extraterritorial Constitution encompasses a given case. If it did not, other questions included when and how each framework applied, as well as the scope of *Verdugo-Urquidez*.

Several factors support the conclusion that, in *Boumediene*, the Court supplanted its requirement that noncitizens have a "substantial [U.S.] connection" to invoke the Constitution extraterritorially with a new "practical considerations" inquiry.[75] First, the Court plainly endorsed a

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71. *Id.* at 758–59 (citing Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).

72. *Id.* at 764. Justice Kennedy interprets the *Insular Cases* as standing for the proposition that "the Constitution, by its own force, applies in any territory that is not a State," an "independent force . . . [that is] not contingent upon acts of legislative grace." *Id.* at 756–58. As for the doctrine of territorial incorporation, whereby only some provisions applied to certain territories, Justice Kennedy attributes this to the Court needing a doctrine "that allowed it to use its power sparingly and where it would be most needed," in a phrase: "[p]ractical considerations." *Id.* at 758–59 (citing *Balzac*, 258 U.S. at 312). Justice Kennedy observes that "[p]ractical considerations weighed heavily as well in . . . *Eisentrager*," noting that the Court, after reasoning that the Constitution generally does not apply to noncitizens abroad, then considered other factors. *Id.* at 762–63 (citing Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)) ("[T]he difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding [include] . . . 'allocation of shipping space, guarding personnel, billeting and rations.'").

73. *Id.* at 766.

74. *See id.* at 771 ("We hold that Art. I, § 9, cl. 2 of the Constitution has full effect at Guantanamo Bay.").

75. Mygatt-Tauber, *supra* note 60, at 255 (citing Boumediene v. Bush, 553 U.S. 723, 759–60 (2008)).

departure from its prior paradigms for bounding the noncitizens' extraterritorial Constitution when the Court analyzed facts besides the parties' "citizenship" status and the "site[]" of the claim to hold that a constitutional right reached noncitizens beyond de jure U.S. borders.[76] Maybe de facto U.S. control at Guantanamo had a disproportionate influence in the Court's application of the balancing test[77]—raising the prospect that the *Boumediene* framework is less likely to yield constitutional rights for noncitizens in other foreign settings—but the Court did analyze other factors, broadly instructing that "questions of extraterritoriality turn on objective factors and practical concerns . . . not formalism."[78] The Court also exclusively invoked Justice Kennedy's concurrence when citing *Verdugo-Urquidez*;[79] reinterpreted the *Insular Cases* and *Eisentrager* as based on practical concerns;[80] and analogized to *Reid*: the "overthrow" of the "strictly territorial" Constitution for citizens.[81] In addition, global due process comports with the Court's

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76. *Boumediene*, 553 U.S. at 766.

77. *See id.* at 769–70 (heavily weighing attributes of Guantanamo unlikely to exist in other settings for analysis of second and third factors); *id.* at 770–71 (conceding "the Court ha[d] never held that noncitizens detained . . . in territory over which another country maintains *de jure* sovereignty have any [constitutional] rights" but then justifying extending them on the ground that the case "lack[s] any precise historical parallel[,]" in part given the detainee's presence "in a territory . . . under the complete and total control of [the U.S.] Government").

78. *Id.* at 764.

79. Justice Kennedy would have asked whether it would be "impracticable and anomalous" for the Warrant Clause to reach the noncitizen defendant's property in Mexico to decide *Verdugo-Urquidez*, a far broader test for determining the Clause's reach than the plurality's substantial connections test. *See supra* notes 64–67 and accompanying text. That a majority of the Court in *Boumediene* "cite[d] *Verdugo-Urquidez* only two times, both cites to Justice Kennedy's concurrence in that case," supports the view that Justice Kennedy "secured five votes to make" the "impracticable and anomalous" test "the appropriate means of determining if a specific constitutional provision applies abroad." Mygatt-Tauber, *supra* note 60, at 255 (citing *Boumediene*, 553 U.S. at 759, 760–62).

80. These cases can be read to stand for countervailing views. Boumediene v. Bush, 533 U.S. 723, 834–39 (2008) (Scalia, J., dissenting); *id.* at 839 ("None of the Insular Cases stands for the proposition that [] [noncitizens] located outside U.S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus."). But the Court opted to "eschew[] a bright-line territorial rule[;]" "soften[] more rigid interpretations of its earlier decisions in the *Insular Cases*[;]" and "distinguish[] its . . . decision in *Johnson v. Eisentrager*[.]" Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 631 (2021); *Boumediene*, 533 U.S. at 755–59, 762–64.

81. Neuman, *supra* note 5, at 918. Although the *Reid* plurality casts doubt on strict territorialism's stature by holding that a constitutional provision reached citizens abroad, the opinion's reasoning neither precluded nor endorsed making the same theoretical move for noncitizens. *See supra* notes 51–57 and accompanying text. In *Boumediene*, the Court interpreted *Reid* as not having rested on the detainees' citizenship, explaining that,

statements that judicial review must be flexible "even . . . outside [U.S.] borders" or else the political branches would have "'absolute and unlimited power'" to "switch the Constitution on or off at will."[82] As such, global due process seemed to have become the default rule absent a decision of the Court holding that *Boumediene* was wrongly-decided.

On the strength of these arguments, scholars overwhelmingly agreed that "*Boumediene* confirm[ed] . . . the . . . Court's 'functional approach'" to the noncitizens' extraterritorial Constitution,[83] using a common label to describe the practical concerns framework.[84] In 2017, Justice Breyer endorsed this conclusion in the first iteration of *Hernández v. Mesa* ("*Hernández I*") in a dissent applying the *Boumediene* framework to conclude that the Mexican victim of a cross-border shooting could bring a Fourth Amendment excessive force claim.[85]

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for "Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition [of *Reid*,])" various "practical considerations" unrelated to their citizenship were "decisive" in reaching those votes. *Boumediene*, 553 U.S. at 760. The Court then proceeds to derive its "practical considerations" framework (referred to elsewhere in this Note as the "practical concerns" framework) from the "'impractical and anomalous' extraterritoriality test" in Justice Harlan's *Reid* opinion. *See id.* at 759 (citation omitted).

82. *Id.* at 765 (rejecting absolute powers of the U.S. Government when acting outside of its borders) (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885)). The *Boumediene* Court states that the Constitution does not give the power to Congress or the President "to decide when *and where* its terms apply." Instead, it is the Court's constitutional authority to "say 'what the law is.'" *Id.* (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

83. Neuman, *supra* note 40, at 261; *see also* Ponsa-Kraus, *supra* note 40, at 974 ("[T]he [Court] . . . endorsed a 'functional' approach toward matters of constitutional extraterritoriality."); Mygatt-Tauber, *supra* note 60, at 255–56 ("While not a direct repudiation of *Verdugo-Urquidez*, *Boumediene* rejected the notion that a substantial connection with the United States is a necessary precondition to invoke . . . [constitutional] protections . . . .").

84. Scholars often use formalism to characterize *Verdugo-Urquidez*'s "'substantial connections' approach" and describe *Boumediene* as the introduction of "a multi-factor, 'functional' approach." Marouf, *supra* note 21, at 778–85. These labels connote two general approaches that the Court adopts to separation of powers cases. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 489 (1987) (arguing that the "Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government . . . and a functional approach that stresses core function and relationship, and permits a good deal of flexibility . . . ."). This Note does not use the labels since overreliance on them may yield "under-theorized" answers to constitutional questions and mask deeper disagreements about the Constitution. Aziz Z. Huq, *The Political Path of Detention Policy,* 48 AM. CRIM. L. REV. 1531, 1534–37 (2011).

85. *See* Hernández v. Mesa ("*Hernández I*"), 137 S. Ct. 2003, 2008–11 (2017) (Breyer, J. dissenting) (joined by Justice Ginsburg). In a later iteration of the same case, Justice Ginsburg authored a dissent that cited favorably to *Boumediene*'s rights-receptive

For those who thought *Boumediene* "enshrined globalism in American jurisprudence," the key issue became how its balancing test could be applied effectively in other settings.[86] Scholars expressed deep concern that the balancing test was too "vague" and "malleable" to apply to other constitutional provisions.[87] As a result, many articles propose refinements to the framework, like using the International Covenant on Civil and Political Rights as a baseline.[88]

For lower courts, the importance of *Boumediene* was not so obvious. Some applied the three-factor practical concerns framework to determine whether a constitutional provision reached a noncitizen abroad, but usually just in other Suspension Clause cases.[89] In most cases, courts continued to apply the *Verdugo-Urquidez* plurality's substantial connections test to decide the same question, regardless of the constitutional provision

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test. *See* Hernández v. Mesa, 140 S. Ct. 735, 754 n.1 (2020) ("*Hernández II*") (Ginsburg, J., dissenting) (citation omitted) ("[I]t would not be 'impracticable' or 'anomalous' to subject Mesa's U.S.-based conduct to Fourth Amendment scrutiny.") (citing *Boumediene*, 553 U.S. at 759–760).

86. Falkoff & Knowles, *supra* note 15, at 871.

87. Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 309 (2011); *see also* Neuman, *supra* note 40, at 273 ("Undoubtedly, the functional approach to the geographical scope of constitutional rights suffers from the lack of certainty that bright-line rules would provide."); Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 63 (2011) (describing how the D.C. Circuit's application of the *Boumediene* framework in Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010), "illustrates the subjectivity involved in applying the 'practical obstacles' test").

88. *See, e.g.,* Neuman, *supra* note 40, at 277 (proposing that courts use the International Covenant on Civil and Political Rights (ICCPR) as a baseline for the reach of the noncitizens' extraterritorial Constitution, but conceding the Court is unlikely to embrace that approach); Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1634 (2013) (proposing that courts categorically decide whether the noncitizens' extraterritorial Constitution encompasses a certain provision by asking "whether the constitutional principle involved is so fundamental to a democratic order and the rule of law that it must restrain U.S. action not just domestically, but also internationally"); Ponsa-Kraus, *supra* note 40, at 974–78, 1032–33 (proposing that courts postpone any inquiry into the enforceability of a constitutional provision abroad until after determining that the noncitizen possesses the right it secures).

89. For examples of courts conducting a *Boumediene* practical factors analysis to decide if the Suspension Clause reaches foreign locales other than Guantanamo, see Al Maqaleh v. Gates, 605 F.3d 84, 94–99 (D.C. Cir. 2010) (Bagram Airfield in Afghanistan), *remanded to* 899 F. Supp. 2d 10 (D.D.C. 2012); United States v. Cabezas-Montano, 949 F.3d 567, 616–17 (11th Cir. 2020) (Rosenbaum, J., concurring) (Coast Guard ship traversing international waters).

at issue.[90] The persistence of this approach after *Boumediene* thus raised several further questions.

First, the *Verdugo-Urquidez* plurality did not explicitly decide that a noncitizen who has developed meaningful connections with the United States can invoke the Constitution while abroad. Read carefully, the determinative parts of the opinion seem to contemplate the prospect,[91] and prominent scholars have read the opinion in that manner.[92] Still, the plurality left much to be desired in terms of consistency: elsewhere, its opinion defines the required connection in other ways,[93] and at points the opinion even implies there is a bright-line rule foreclosing constitutional

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90. Mygatt-Tauber, *see supra* note 60, at 240 n.7 (compiling cases); *see also* Neuman, *supra* note 19, at 379–80 (compiling cases and further characterizing how the D.C. Circuit has "enthusiastically expounded the theory that foreign persons without 'presence or property' in the United States are not entitled to the protection of the due process clause"); Harbury v. Deutch, 233 F.3d 596, 602–04 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* Christopher v. Harbury, 536 U.S. 403 (2002) (holding that a foreign citizen lacked Due Process Clause protection from torture under *Verdugo-Urquidez*, notwithstanding that person's marriage to a U.S. citizen). In another case, the Fifth Circuit applied the substantial connections test despite articulating its explicit recognition that *Boumediene* "appears to repudiate [the *Verdugo-Urquidez* plurality opinion's] formalistic reasoning. Hernández v. United States, 757 F.3d 249, 265 (5th Cir. 2014); *cf.* Hernández v. United States, 785 F.3d 117, 136 (5th Cir. 2015) (Prado, J., concurring) (describing *Boumediene* as a "watershed opinion" that "announced the bedrock standards for determining the extraterritorial reach of the Constitution," but nonetheless concurring on other grounds).

91. The plurality opinion suggests that had the defendant been in the United States for longer than a few days then he may have developed a "previous significant voluntary connection" that would suffice to justify the Fourth Amendment protections that he sought. United States v. Verdugo-Urquidez, 494 U.S. 259, 271–72 (1990) (plurality opinion); *see also id.* at 269 (citing Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)) ("The [noncitizen] has been accorded a generous and ascending scale of rights as [they] increase [in] identity with our society."); *id.* at 271 (contrasting defendant, a noncitizen "who ha[d] had no previous significant voluntary connection with the United States," with noncitizens that were granted Fourth Amendment rights regarding domestic U.S. Government action).

92. *See, e.g.*, Neuman, *supra* note 40, at 268 n.58 ("Rehnquist's [opinion] . . . at least tentatively suggested that [noncitizens] lawfully residing in the United States were entitled to extraterritorial constitutional protection.").

93. *See Verdugo-Urquidez*, 494 U.S. at 282–83 (Brennan, J., dissenting) (criticizing the plurality for inconsistent descriptions of the test as requiring a noncitizen to show "'sufficient connection' with th[e] United States]," "presence in the United States [that is] voluntary and . . . 'accept[ance of] some societal obligations[,]'" and "the place searched [being] in the United States." (first quoting *Verdugo-Urquidez*, 494 U.S. at 265 (plurality opinion); then quoting *id.* at 273; and then citing *id.* at 266, 274–75)). *But see* Rebecca Hill, *Data at the Border: Resolving the Circuit Split and Proposing New Procedural Standards for Warrantless Border Searches of Cell Phones*, 49 CAP. U. L. REV. 179, 207 n.228 (2021) ("What constitutes 'substantial connections' was never discussed in this case.").

rights for noncitizens abroad.[94] In *Trump v. Hawaii*, Justice Thomas wrote one sentence in his concurrence implying that the *Verdugo-Urquidez* plurality opinion precluded the extraterritorial reach of the First Amendment to noncitizens.[95]

Assuming that the substantial connections and practical concerns frameworks were both still viable approaches to decide whether to extend a constitutional right to a noncitizen abroad, it remained unclear whether they were mutually exclusive. In 2012, the Ninth Circuit seemed to treat them as compatible in holding that a foreign national could challenge her placement on a government "No-Fly List" under the First and Fifth Amendments: the decision noted that she had developed a "significant voluntary connection" with the United States while studying at Stanford University and had left the United States "to further, not to sever, her connection".[96] However, in addition the panel further characterized its decision as one that was grounded in "the 'functional approach'" of *Boumediene*, effectively synergizing the frameworks.[97]

In 2016, the Court appeared ready to explain the relationship between the frameworks on the premise that they were instead mutually exclusive. In *Hernández I*, the Court granted certiorari to decide whether "a formalist or functionalist analysis govern[s] the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force" in the context of a cross-border shooting.[98] This question teed up whether the framework of the plurality in *Verdugo-Urquidez* or the Court in *Boumediene* applied to decide whether a constitutional provision that was not at issue in

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94. *Verdugo-Urquidez*, 494 U.S. at 266 (plurality opinion) ("[T]he purpose . . . was to protect the [U.S.] people . . . against arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against [noncitizens] outside . . . [U.S.] territory."); *id.* at 270 ("Since respondent is not a [U.S.] citizen, he can derive no comfort from the *Reid* holding."); *id.* at 269 (citing *Eisentrager*, 339 U.S. at 784) ("[E]xtraterritorial application of organic law would have been so significant an innovation in the practice of governments . . . it could scarcely have failed to excite contemporary comment . . . . No decision of this Court supports such a view.").

95. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)) ("The plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad.").

96. Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 987, 997 (9th Cir. 2012).

97. *Id.* at 997; Matthew J. Sunday, *Extending New Property Theory and Constitutional Protections Extraterritorially to Provide Procedural Due Process to Foreign Nationals During Visa Revocation Proceedings*, 30 CORNELL J.L. & PUB. POL'Y 373, 400 (2020) (describing the "Ninth Circuit's adoption of a combined *Boumediene* and *Verdugo-Urquidez* (*BVU*) framework").

98. Petition for Certiorari at I, *Hernández I*, 137 S. Ct. 2003 (2017) (No. 15-118).

either case reached a noncitizen outside U.S. territory.[99] The Fifth Circuit had applied the substantial connections test.[100] Ultimately, the Court did not speak to whether that was correct—or directly address any of the unsettled questions about the noncitizens' extraterritorial Constitution—when it remanded, explaining that it would be "imprudent" to address the "sensitive" issue and its "far-reaching . . . consequences" when the case might be resolved under the Court's latest *Bivens* decision instead.[101]

Subsequent developments display the lack of cogent, consensus-based thought regarding the scope of the noncitizens' extraterritorial Constitution immediately prior to *AOSI II*. For instance, the Ninth Circuit held in 2018 that the Mexican victim of a cross-border shooting could bring a Fourth Amendment excessive force claim against a U.S. border patrol officer in a decision that rested on "practical concerns"—including to distinguish *Verdugo-Urquidez*.[102] Put differently, the same Circuit that had applied a framework combining *Boumediene* and *Verdugo-Urquidez* in 2012 principally relied on *Boumediene* in 2018 to extend the noncitizens' extraterritorial Constitution to reach a cross-border shooting—the exact

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99. *See also supra* note 84 and accompanying text (explaining that formalism and functionalism connote the *Verdugo-Urquidez* plurality opinion and *Boumediene* frameworks, respectively).

100. Hernández v. United States, 785 F.3d 117, 119–20 (5th Cir. 2015) (per curiam).

101. *Hernández I*, 137 S. Ct. 2003, 2007 (2017). Since no statute provides for damages claims against a federal officer in this context, the parents filed a *Bivens* action, asking the district court to infer the availability of a damages remedy for the redress of the alleged constitutional violation. *See* Emily Maino, Hernández v. Mesa: *The Empty Promise of* Bivens *and the Precarious Road to "Nothing"*, 98 DENV. L. REV. F. 1, 1–2 (2021) (providing general background on *Bivens* actions before arguing the Court decided *Hernández I* improperly). The Court handed down its most recent decision on *Bivens* claims earlier that day. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017). Curiously, the *Verdugo-Urquidez* plurality had previously implied that the inquiry into the reach of a constitutional provision *precedes* the analysis of whether *Bivens* reaches a certain context. United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) (plurality opinion) ("Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.") (citations omitted).

102. *Compare* Rodriguez v. Swartz, 899 F.3d 719, 729 (9th Cir. 2018), *cert. granted, judgment vacated*, 140 S. Ct. 1258 (2020) ("*Boumediene* . . . establishes that to determine whether the Constitution applies here, we must examine J.A.'s citizenship and status, the location where the shooting occurred, and any practical concerns that arise . . . . [C]itizenship is just one of several non-dispositive factors . . . .") (citation omitted)*, and id.* at 731 ("The practical concerns in *Verdugo-Urquidez* about regulating conduct on Mexican soil also do not apply here.")*, with* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) ("The law that we are bound to follow is . . . the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo-Urquidez*.").

same context in which the Fifth Circuit had applied *Verdugo-Urquidez* in *Hernández I*, where the Court remanded on other grounds. After the Court's second decision in *Hernández v. Mesa* ("*Hernández II*"), which affirmed the holding that a *Bivens* remedy was unavailable for the cross-border shooting victim's constitutional claim, the Court vacated the Ninth Circuit's judgment in 2020 with instructions to consider *Hernández II*.[103]

As a second example of the lack of consensus, in contrast with how the Ninth Circuit doubled down on *Boumediene* in its 2018 decision, scholars expressed renewed interest in *Verdugo-Urquidez* following *Hernández II*. Some authors argued that the two cases' rules ought to be combined into a single framework so as to further settle the doctrine; competing proposals emerged for how to structure a hybrid inquiry.[104] Ironically, one of the most insightful studies of *Verdugo-Urquidez* was instead written by a proponent of the view that *Boumediene* had supplanted the substantial connections test as the default approach to questions of constitutional extraterritoriality for noncitizens—including in Warrant Clause cases like *Verdugo-Urquidez*.[105] Notably, the writer faults courts that have applied the substantial connections test to parts of the Constitution that do not include the phrase "the people", the idea being that the plurality's holding turned on that phrase's presence in the Fourth Amendment. For reasons explained in Part II, the strength of that argument may have newfound import today.[106]

In sum, vital questions about the scope of the noncitizens' extraterritorial Constitution remained unanswered in 2020. There were

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103. Swartz v. Rodriguez, 140 S. Ct. 1258, 1258 (2020); *Hernández II*, 140 S. Ct. 735, 739 (2020). For additional discussion of the Court's *Bivens* analysis in *Hernández II*, see *infra* notes 201–02 and accompanying text.

104. *Compare* Netta Rotstein, Boumediene *vs.* Verdugo-Urquidez*: The Battle for Control over Extraterritoriality at the Southwestern Border*, 93 WASH. U. L. REV. 1371, 1392 (2016) (suggesting a three step framework integrating the *Boumediene* and *Verdugo-Urquidez* approaches to "clarify and streamline" the extraterritoriality doctrine)*, and* Veneziano, *supra* note 2, at 633 (suggesting a looser fusion as extraterritoriality cases "demand context-specific evaluation and solutions[,]" and so "one approach should function as a supplement [to] the other")*, with supra* note 86 and accompanying text (describing three proposals to refine *Boumediene*).

105. Mygatt-Tauber, *supra* note 60, at 255–58 (arguing, despite the belief that *Boumediene* controls even in Warrant Clause cases, that courts should still refine the "substantial connections" test).

106. *See id.* at 243–51 n.102–07 (explaining how the plurality relied on the "textual exegesis" of this language, together with the Preamble, as evidence of a protection limited to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community") (citations omitted); *id.* at 253–54 (criticizing courts for applying the "substantial connections" test to provisions like the Takings Clause lack the textual hook). For the contemporary relevance, see Part II.B.2.

others, too, such as the threshold question of when a claim is extraterritorial for the purposes of triggering the doctrine,[107] as well how to reconcile the doctrine with the Court's jurisdictional due process cases, which extend protections for noncitizens abroad under the Constitution specifically due to their lack of voluntary connections to the country.[108] This was the confused doctrinal landscape when the Court decided *AOSI II*.

C. *AOSI II*: Cementing the "Bedrock Principle" That Wasn't?

Before *AOSI II*, the Court had decided a related case in 2013. The first decision ("*AOSI I*") struck down a provision in the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), a foreign aid program designed to combat HIV/AIDS,[109] which appropriated billions of dollars to NGOs to aid in this global effort on the condition that each recipient explicitly oppose sex work (the "Policy Requirement").[110] A group of American NGOs, concerned that making the statement would hamper their health programs' efficacy, challenged the Policy Requirement on First Amendment grounds.[111] In *AOSI I*, a 6-2[112] Court struck down the

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107. For further discussion, see Part II.B.

108. *See infra* Part III.B (proposing a way to reconcile the contradictions between these doctrines).

109. *See AOSI II*, 140 S. Ct. 2082, 2095 (2020) ("The Act has helped save an estimated 17 million lives, primarily in Africa, and is widely viewed as the most successful American foreign aid program since the Marshall Plan.").

110. *AOSI I*, 570 U.S. 205, 208 (2013); 22 U.S.C § 7631(f) ("No funds made available to carry out this chapter . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution."). Congress justified the imposition of this requirement on legislative findings that women's social vulnerability makes them more susceptible to HIV/AIDS and that sex work "degrade[s] . . . women and children," exacerbating that vulnerability. Ami S. Watkin, *The Leadership Act and its Policy Requirement: Changing Laws, Not Reality*, 78 BROOK. L. REV. 1131, 1133–34 (2013) (citing § 7601(3)(B)) (quoting § 7601(23)). Defendants USAID and HHS had enforced the condition in awarding Leadership Act funds. *AOSI I*, 570 U.S. at 205.

111. The NGOs were concerned that such a policy would "alienate certain host governments," "require them to censor their privately funded discussions" in professional forums, and garner distrust with sex workers, a group often disproportionately afflicted by HIV/AIDS. *AOSI I*, 570 U.S. at 208, 211; Watkin, *supra* note 110, at 1133 (noting up to forty percent of sex workers in Cambodia had HIV in 2013).

112. Justice Kagan "recused herself due to her previous involvement in the issue as solicitor general under President Obama." John Kruzel, *Supreme Court Rules US Requirements on Overseas NGOs Do Not Violate Free Speech*, THE HILL (June 29, 2020), https://thehill.com/regulation/court-battles/504995-supreme-court-rules-us-requirements-on-overseas-ngos-do-not-violate [https://perma.cc/VA68-277E].

condition under a doctrine barring certain funding requirements that limit free speech.[113]

In *AOSI II*, a subset of the same U.S.-incorporated NGOs who were plaintiffs in *AOSI I* challenged the Policy Requirement again.[114] These particular NGOs each operated as the U.S. branch in a global "family of entities that share the same name, brand, logo, and mission."[115] Because the U.S. Agency for International Development incentivizes "U.S.-based NGOs . . . to conduct . . . HIV/AIDS work through separately incorporated foreign affiliates rather than through branch offices," each network was also comprised of partner entities incorporated abroad.[116] In *AOSI II*, the American organizations argued that the continued application of the Policy Requirement to their "closely identified foreign affiliates"[117] violated their own First Amendment rights under the misattribution doctrine.[118] The district court enjoined enforcement of the Policy Requirement on the foreign NGOs, and the Second Circuit affirmed.[119] Both courts accepted the

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113. This line of cases balances two competing principles: first, that parties generally have "recourse . . . to decline . . . funds" if they have an "object[ion] to a condition on the receipt of federal funding," but, second, that the "Government may not deny a benefit to a person that infringes [their] constitutionally protected . . . freedom of speech even if [they] ha[ve] no entitlement to that benefit." *AOSI I*, 570 U.S. at 214 (internal quotation omitted). In *AOSI I*, the Court draws a "line," admittedly "hardly clear," between conditions that "define the limits of the government spending program" and those "seek[ing] to leverage funding to regulate speech outside the program itself," with the latter unconstitutional. *Id.* at 214–15. Since the Leadership Act already barred the use of funds "to promote or advocate the legalization or practice of prostitution," six Justices reasoned that the "Policy Requirement . . . must [have been] doing something more" than defining the program's contours: it was improperly "compelling a grant recipient to adopt a particular belief as a condition of funding." *Id.* at 217–18 (quoting 22 U.S.C. § 7631(e)).

114. *AOSI II*, 140 S. Ct. at 2085–86.

115. Brief for Plaintiffs-Appellees at 6, *AOSI II*, 911 F.3d 104 (2d Cir. 2018) (No. 15-974(L)).

116. *Id.* at 8.

117. Both the American and the foreign organizations jointly "convey a . . . consistent message to high-risk populations, government officials, . . . and private donors across the globe[;] . . . share the same name, logo, and branding—all . . . [with] identical . . . fonts[] and imagery[; and] . . . adhere to shared values, work towards common goals, and coordinate their collective message." *AOSI II*, 140 S. Ct. 2092, 2094 (2020) (Breyer, J., dissenting).

118. The Court's speech misattribution cases bar Government-imposed speech in cases that pose a "ventriloquism" problem, raising a high "probability that the speech in question is likely to be taken as that of the speaker, or the danger that it will be misattributed to another speaker." Anna M. Taruschio, *The First Amendment, The Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1019 (2000).

119. *AOSI II*, 106 F. Supp. 3d 355, 363 (S.D.N.Y. 2015); *AOSI II*, 911 F.3d 104, 108–09 (2d Cir. 2018).

idea that the plaintiffs' rights as American entities were at stake.[120] Both also relied heavily on *AOSI I*, which contemplated that these NGOs might exercise their First Amendment rights through affiliates and suggest that, if the Policy Requirement were applied to such affiliates' receipt of funds, that arrangement could raise constitutional concern.[121]

In a 5-3 vote, the Supreme Court reversed. Given charges that parts of *AOSI II* are dicta,[122] the structure of the Justice Kavanaugh-authored decision warrants close examination. First, the Court explains that it must reverse the judgments below because the "[p]laintiffs' position runs headlong into two bedrock principles of American law[:]" the ostensibly "long settled" constitutional principle that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution," and the corporate law principle that "separately incorporated organizations are separate legal units with distinct legal rights and obligations."[123] The Court follows its enunciation of each principle with a brief discussion of its content and related authority;[124] then, the Court notes that these principles "together lead [the Court] to [the] simple conclusion" that, "[a]s foreign organizations operating abroad, [the] plaintiffs' foreign affiliates possess no rights under the First Amendment[,]" which appears to be the holding.[125]

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120. *AOSI II*, 911 F.3d at 110 ("It is the First Amendment rights of the *domestic plaintiffs* that are violated when the Policy requirement compels them to 'choose between forced speech and paying 'the price of evident hypocrisy.'") (citing *AOSI II*, 106 F. Supp. 3d at 361 (citing *AOSI I*, 570 U.S. 205, 219 (2020))); *AOSI II*, 106 F. Supp. 3d at 361 ("[The] constitutional violation is the same regardless of the nature of the affiliate [since] . . . it is the domestic NGO's constitutional right that the Court found is violated."); Brief for Plaintiffs-Appellees at 40, *AOSI II*, 911 F.3d 104 (2d Cir. 2018) (No. 15-974(L)) ("[T]here is 'no dispute' for present purposes that foreign actors outside the United States have no First Amendment rights; that point is simply irrelevant in this case.") (citations omitted).

121. *See AOSI I*, 570 U.S. at 219 (expressly discussing how the NGOs may employ "clearly identified" affiliates to exercise their speech rights); *id.* (noting that, "[i]f the affiliate is more closely identified with the recipient," the recipient repeats the Government's "beliefs . . . only at the price of evident hypocrisy," insofar the speech would contradict that of its "closely identified" affiliate. *Id.* at 219. In *AOSI II*, the lower courts based their holdings near-exclusively on this language, holding that the Policy Requirement violated the American NGOs' rights as it forced them to "choose between forced speech and paying 'the price of evident hypocrisy.'" *AOSI II*, 911 F.3d at 110 (citing *AOSI II*, 106 F. Supp. 3d at 361 (citing *AOSI I*, 570 U.S. at 219)).

122. *See infra* notes 151–54 and accompanying text (explaining the argument and compiling examples of it).

123. *AOSI II*, 140 S. Ct. 2082, 2086–87 (2020).

124. *See id.* at 2086–87 (extraterritoriality principle); *id.* at 2087 (corporate principle).

125. *Id.* at 2088.

Second, the Court explains why its "conclusion corresponds to historical practice regarding [U.S.] foreign aid,"[126] as well as the tradition of judicial abstention from U.S. foreign policy.[127] This reasoning reinforces the Court's "conclusion[,] . . . [i]n short," that the "foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights,"[128] again framed as a self-evident basis to dismiss the plaintiffs' claims.

Finally, the Court cursorily addresses the misattribution case law and the idea that only U.S. NGOs' rights were at issue.[129] Both of these analyses are framed as the Court's response to two counterarguments, neither of which "overcome[s]" the Court's main "conclusion."[130]

The Court's justification for the "longstanding" rule about extraterritoriality is astoundingly brief. The Court relies on citations to seven authorities: (1) a statement from the oral argument ("[p]laintiffs do not dispute" that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution"); (2) *Boumediene*, where it characterizes Guantanamo as de facto U.S. territory; (3) Justice Scalia's dissent in *Hamdi v. Rumsfeld*, an earlier Guantanamo habeas case; (4) language in the *Verdugo-Urquidez* plurality opinion suggesting that noncitizens always lack constitutional rights abroad; (5) language to that same effect in *Eisentrager*; (6) a 1901 deportation case; and (7) the U.S. Constitution's Preamble.[131] The Court does not elaborate further on why those authorities support the

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126. *See, e.g.*, *id.* at 2087–88 ("Acting with the President . . . Congress sometimes imposes conditions on foreign aid [such as] condition[ing] funding on a foreign organization's ideological commitments[:] . . . democracy, pro-women's rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U.S. foreign aid serves U.S. interests.") (citations omitted).

127. *See, e.g.*, *id.* at 2088 ("[P]laintiffs' approach would throw a constitutional wrench into [U.S.] foreign policy. In particular, [it] would put Congress in the untenable position of either cutting off certain funding programs altogether, or instead funding . . . organizations that may not align with U.S. values.").

128. *Id.*

129. *Id.* at 2088–89.

130. *AOSI II*, 140 S. Ct. 2082, 2088–89 (2020). *But see id.* at 2092–94 (Breyer, J., dissenting) (engaging more thoroughly with the Court's speech misattribution precedents to reach the "common-sense conclusion" that the majority's holding "would undermine First Amendment protections for the countless American speakers who address audiences overseas"). For analysis of the Court's response to the argument that only American NGOs' rights were at stake, see *infra* notes 157–160 and accompanying text (showing that there was actually little substance).

131. *Id.* at 2086 (citing Transcript of Oral Argument, at 58–59, *AOSI II*, 570 U.S. 205 (2020), Boumediene v. Bush, 553 U.S. 723, 770–71 (2008), Hamdi v. Rumsfeld, 542 U.S. 507, 558–59 (2004) (Scalia, J., dissenting); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292, 280–84 (1904); Johnson v. Eisentrager, 339 U.S. 763, 767–68 (1950); United States v. Verdugo-Urquidez, 494 U.S 259, 1060–66 (1990); U.S. CONST., pmbl.).

stated "bedrock principle" of extraterritoriality; instead, it then lists two exceptions.[132] First, "foreign citizens *in the United States* may enjoy certain constitutional rights—for example, the right to due process in a criminal trial."[133] Second, per *Boumediene*: "[U]nder *some* circumstances, foreign citizens in the U.S. Territories—or in 'a territory' under the 'indefinite' and 'complete and total control' and 'within the constant jurisdiction' of the United States—may possess certain constitutional rights."[134] Before turning to its next argument, the Court notes that if "foreign citizens outside the United States or such U.S. territory [could] assert rights under the U.S. Constitution," then "actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U.S. Constitution."[135] This analysis, excerpted above, is the extent to which the Court engaged with its extraterritoriality case law in *AOSI II*.

As Justice Breyer noted in dissent, *AOSI II* is in many respects unpersuasive. [136] Twelve years earlier, the Court had declared in *Boumediene*, "questions of extraterritoriality turn on objective factors and practical concerns . . . not formalism."[137] The Court did not need to revisit that proposition in *AOSI II*, decided below as a case about the "rights of American organizations."[138] But the Court did so, relying on a categorical, ostensibly bedrock principle that denies there is any noncitizens' extraterritorial Constitution except in Guantanamo-esque settings.[139]

II. Crystallizing the Prospects for the Noncitizens' Extraterritorial Constitution

The phrase bedrock principle connotes a firmly settled body of law, but that does not describe the doctrine bounding the noncitizens' extraterritorial Constitution prior to *AOSI II*. To the contrary, in 2016 the

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132. *Id.* at 2087.

133. *Id.* at 2086 (citations omitted).

134. *Id.* (citing *Boumediene*, 553 U.S. at 755–71).

135. *Id.* at 2086–87; *see also id.* at 2087 ("That has never been the law.") (citing *Verdugo-Urquidez*, 494 U.S. at 273–74 (plurality opinion); *Eisentrager*, 339 U.S. at 784).

136. *See, e.g.*, *id.* (Breyer, J., dissenting) ("This case is not about the First Amendment rights of foreign organizations. It is about—and has always been about—the First Amendment rights of American organizations.").

137. *Id.* at 2100 (Breyer, J., dissenting) (citing Boumediene v. Bush, 553 U.S. 723, 764 (2008)).

138. *Id.* at 2090, 2099 (Breyer, J., dissenting); *see also supra* note 120 and accompanying text (compiling evidence from these decisions and pleadings emphasizing how the lower courts understood the case in this manner).

139. *AOSI II*, 140 S. Ct. 2082, 2087 (2020).

Court signaled that the law was unsettled when it granted certiorari on the question of whether "a formalist or functionalist analysis govern[s] the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force" in the context of a cross-border shooting.[140] Had the "bedrock principle" been settled law after *Boumediene*, the Court "could have disposed of *Hernández* [*I*] . . . in a few short sentences."[141] At first blush, *AOSI II* instead appears to have introduced a new default rule that courts must apply to decide whether the Constitution reaches a noncitizen's extraterritorial claim in a given context, a more "categorical" bar to the extension of rights than either of the Court's prior frameworks.[142]

The remainder of this Note provides the first in-depth analysis into what, if anything, remains of the noncitizens' extraterritorial Constitution after *AOSI II*. Part II catalogues and expands upon the interpretations of *AOSI II* that have been proposed by scholars and applied by courts since the decision was handed down. Part II.A demonstrates that, although scholars have articulated persuasive arguments against applying the bedrock principle in other cases, several courts have done precisely that. Part II.B then contrasts three grounds upon which judges in the Second and Ninth Circuits have explicitly distinguished *AOSI II* in cases where it might have been applied. In Part III, the Note offers a fourth proposal for narrowly interpreting the decision.

A. One Year Later: Coming to Terms with an Eroded Noncitizens' Extraterritorial Constitution

Part II.A reveals a severe tension between most scholars' reactions to *AOSI II* and several courts' early applications of the bedrock principle.[143] First, Part II.A.1 presents three arguments that academics have advanced for disregarding *AOSI II* in cases that implicate the bounds of the noncitizens' extraterritorial Constitution. Part II.A.2 then describes four cases in which courts have done exactly the opposite, suggesting that, regardless of whether one views the decisions as rightly- or wrongly-decided, observers would be keen to take the bedrock principle seriously.

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140. Petition for Certiorari at I, *Hernández I*, 137 S. Ct. 2003 (2017) (No. 15-118).

141. *AOSI II*, 140 S. Ct. at 2099–100 (Breyer, J., dissenting) (noting this would be the case if "the majority's categorical rule of (non)extraterritoriality [was] etched in stone" at that time).

142. *See supra* note 31 and accompanying text.

143. For a rare statement of acquiescence to the bedrock principle in the literature, see Richard W. Murphy, *Due Process and Judicial Review of Government Kill* Lists, 67 LOY. L. REV. 473, 477 n.21 (2021) (stating that *AOSI II* "recently *confirmed* the morally and textually dubious" bedrock principle) (emphasis added) (citation omitted).

1. Arguments that the Noncitizens' Extraterritorial Constitution Remains Unscathed

First, scholars argue that the bedrock principle should not be followed in other cases as it is unpersuasive and contrary to precedent, particularly with regard to the Court's treatment of *Boumediene*.[144] This argument is forceful in several respects. As explained in Part I, *Boumediene* cannot be fairly read to have turned on the de facto sovereignty of the United States at Guantanamo Bay,[145] yet the *AOSI II* Court interprets *Boumediene* in precisely that manner.[146] Remarkably, the Court actually acknowledges that *Boumediene* did not turn on the United States' de facto sovereignty at Guantanamo with its second reference to the decision, a citation pointing to the entirety of Justice Kennedy's balancing analysis: this includes the Court's discussion of facts beyond whether Guantanamo was "'a territory' under the 'indefinite' and 'complete and total control' and 'within the constant jurisdiction' of the United States'" when the detainees filed their petitions.[147] The Court's citations to the *Verdugo-Urquidez* plurality opinion, void of supporting analysis, reflect a similar unwillingness to seriously engage with the case law, especially given the opinion's glaring ambiguities and the extant legal debate over whether it contemplates constitutional rights for noncitizens with substantial U.S. ties when travelling abroad.[148] The Court's other citations for the bedrock principle have their own problems.[149]

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144. *See* Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why* Boumediene v. Bush *Is the Baseline Constitutional Minimum*, 45 HARBINGER 46, 67 (2021) ("[The Court] gave a reading of *Boumediene* that is perfectly opposite of what Boumediene actually held") (citations omitted); Schroeder, *supra* note 36 (manuscript at 20) ("The . . . Court deceptively cited to *Boumediene* as standing for a principle [it] expressly distinguished and delegitimized . . . ."); HARV. L. REV. ASS'N, *supra* note 31, at 499 ("As Justice Breyer observed in his dissent, *Boumediene* . . . held that 'questions of extraterritoriality turn on objective factors and practical concerns' rather than adherence to formalist principles.") (citation omitted)); Neuman, *supra* note 34 (noting the Court's "disregard for the precedential value of *Boumediene* on the issue of noncitizens' extraterritorial rights . . .").

145. *See supra* notes 75–82 and accompanying text.

146. *See supra* note 134 and accompanying text.

147. *AOSI II*, 140 U.S. 2082, 2086 (2020) (citing Boumediene v. Bush, 553 U.S. 723, 755–71 (2008)). These pages in *Boumediene* establish that de facto U.S. sovereignty over a territory is not the *sine non qua* of bounding the noncitizens' extraterritorial Constitution. *See supra* notes 84–89 and accompanying text (relying on these pages in *Boumediene* as authority for each of the arguments that the Note advanced for the view that the Court endorsed global due process as the default approach for bounding the noncitizens' extraterritorial Constitution in 2008).

148. *See supra* notes 91–95 and accompanying text.

149. *See* Arulantham & Cox, *supra* note 21 ("The string cite of precedents that follows th[e] [Court's articulation of the bedrock principle] does not support it. Most

Second, commentators have urged lower courts not to follow *AOSI II* on the ground that the decision departs from "the Court's traditional hesitancy to rule broadly on the extraterritorial reach of the Constitution . . . ."[150] Some judges may find this argument, as well as the first, to be compelling, but at the same time feel reticent to deviate from the bedrock principle if they think the rule was a determinative part of the reasoning in *AOSI II* and therefore binding precedent.

As a result, the third argument—that the Court's discussion of the bedrock principle was dicta[151]—seems to be the most formidable of the three bases for not applying *AOSI II*.[152] If true, the upshot would be that the bedrock principle does not bind judges in cases otherwise governed by *Boumediene* and/or *Verdugo-Urquidez*. Justice Breyer pinpoints the key logic for viewing the bedrock principle as dicta in his dissent: the Court's "sweeping assertion" relates to noncitizens' extraterritorial rights under the Constitution, but *AOSI II* did "not concern the constitutional rights of foreign organizations."[153] Bolstering that point, none of the parties in the case were foreign entities, and the plaintiffs "never claimed that the Policy Requirement violates anyone's First Amendment rights apart from their own."[154] On this view, *AOSI II* only applies on the "unique facts" of citizens claiming that noncitizens' rights were violated,[155] with *Boumediene* and/or *Verdugo-Urquidez* applicable in other cases, having yet to be overturned.[156]

Taking *AOSI II* on its face, judges may pause before adopting this argument given four features of the opinion. First, the Court repeatedly

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obviously, none of them say it."); *see also id.* (articulating several reasons why the citations relied upon for the bedrock principle are suspect).

150. HARV. L. REV. ASS'N, *supra* note 31, at 498.

151. Dicta is legal commentary in an opinion that is unnecessary for the authoring court to have reached its ultimate conclusion in the decision. *Cf.* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1042 (2005) (suggesting a more sophisticated definition of dicta).

152. *See AOSI II*, 140 S. Ct. at 2099 (Breyer, J., dissenting) (citation omitted) (implying that the bedrock principle is dicta); Schroeder, *supra* note 36, at 67–68 ("The statements about *Boumediene* in [*AOSI II*] are entirely dicta—while dicta can be harmful to future cases, it is not final and it is not the law . . . . This is especially so when the Court's dicta is obviously false, and provably absurd.").

153. *AOSI II*, 140 S. Ct. 2082, 2099 (2020) (Breyer, J., dissenting) (citations omitted).

154. *Id.*

155. HARV. L. REV. ASS'N, *supra* note 31, at 498.

156. *See* Sunday, *supra* note 97, at 399 (arguing that, since *AOSI II* "did not purport to overrule" *Boumediene* or *Verdugo-Urquidez*, "it remains to be seen whether the rule will become settled law or . . . is merely dicta . . . ."); Schroeder, *supra* note 144, at 69 ("The . . . Court did not consider overruling *Boumediene*, nor could it."); *id.* at 67–68 ("The statements about *Boumediene* in [*AOSI II*] are entirely dicta—while dicta can be harmful to future cases, it is not final and it is not the law . . . .").

labels its comment, "plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights," as its "conclusion," effectively placing the bedrock principle directly in the statement of holding.[157] Second, when *AOSI II* later addresses the notion that the plaintiffs' own rights as American NGOs were at stake, the Court minimizes the importance of that idea in its decision by addressing it in the context of two counterarguments that fail to "overcome" the Court's earlier "conclusion."[158] Third, the Court, in explaining why that counterargument was unconvincing, largely reiterates its initial description of the bedrock principle.[159] Fourth, the Court regurgitates that same idea again in the next and penultimate sentence of *AOSI II*.[160] The observations together offer strong support to conclude that *AOSI II*'s reasoning is disingenuous, circular, and/or unpersuasive, but the bedrock principle does not seem to be dicta. Rather, the decision appears to have been deliberately structured to rely on a bedrock principle that wasn't.

2. Early Decisions Applying the Bedrock Principle Without Hesitation or Qualification

One of the core contributions of this Note is the following analysis of early federal court decisions that have applied bedrock principle. As mentioned, the legal scholars prone to write about this doctrine have not said much on *AOSI II*, but the remarks that they have published consistently

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157. *AOSI II*, 140 S. Ct. at 2088 (emphasis added); *id.* at 2087.

158. *Id.* at 2088–89. Specifically, the second counterargument was that the Court's reasoning in *AOSI I* should have been dispositive of *AOSI II*. *Id.* at 2089; *see supra* notes 128–29 and accompanying text (discussing how both courts below heavily relied on *AOSI I* to find for the plaintiffs). The Court responds to the contention that *AOSI II* was about "the rights of Americans" in analyzing this other argument. *AOSI II*, 140 S. Ct. at 2089 (citation omitted).

159. *Id.* at 2088–89. To distinguish *AOSI I*, the Court quickly falls back on the bedrock principle. *See id.* at 2089 ("[T]he Court [in *AOSI I*] did not purport to override the longstanding constitutional law principle that foreign organizations operating abroad do not possess constitutional rights[] . . . ."). Then, in responding directly to the argument that *AOSI II* concerned American NGOs' rights, the Court again relies on the bedrock principles. *See id.* ("[*AOSI I*] recognized the First Amendment rights of American organizations . . . . This case instead concerns [separately-incorporated] foreign organizations that are voluntarily affiliated with American organizations . . . . [B]ecause foreign organizations operating abroad do not possess constitutional rights, those foreign organizations do not have a First Amendment right to disregard the Policy Requirement.").

160. *See id.* ("In sum, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad possess no rights under the U. S. Constitution. We reverse . . . .").

pan the decision's fidelity to precedent and its reasoning.[161] Courts, in contrast, have already begun to invoke the bedrock principle, and the cases suggest that *AOSI II* has already begun to concretely influence doctrine beyond its facts. Part II.B.2 discusses four cases; those who believe the bedrock principle was dicta or that *AOSI II* is too unpersuasive to follow may think that some of these courts erred in not opting for *Boumediene* and/or *Verdugo-Urquidez*.

In one case, a district court sought confirmation that the defendant, "Doe," a programmer, could invoke the First Amendment to challenge a subpoena of his emails.[162] From *AOSI II*, the court derived the rule: "[I]f Doe is a U.S. citizen or if he is a non-citizen within U.S. territory, then he may properly invoke the First Amendment; otherwise, he may not."[163] Once provided evidence "Doe was in New York when he sent the emails," the court concluded that he could invoke the First Amendment.[164] The Court does not reveal whether Doe was a noncitizen, but the analysis indicates that if Doe were a noncitizen abroad the holding would have differed.

In another case, the court decided a foreign corporation's motion to stay a preliminary injunction that had been granted to the plaintiff on their intellectual property claims pending an appeal. The defendant argued that complying would cause irreparable harm to their First Amendment rights.[165] In rejecting that argument, the court cited the bedrock principle, explaining that the defendant lacked First Amendment rights since it was a foreign corporation that had "never had an office, agent, or property" in the United States and had a "business territory" that confined its dealings "exclusively" to other regions; this analysis is curious in that it cites *Boumediene*, too.[166]

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161. *See supra* notes 144, 149, 152, 156, and accompanying text (describing the common themes in the initial commentary on *AOSI II*).

162. *In re* Google LLC, No. 20-MC-80141-VKD, 2020 WL 7202818, at *7 (N.D. Cal. Dec. 7, 2020). Specifically, Doe sought to quash the subpoena under a First Amendment doctrine protecting "the rights of individuals to speak anonymously." *Id.* at *8.

163. *Id.* at *12.

164. The court held the First Amendment reached the defendant's motion under Ninth Circuit precedent recognizing that it protects noncitizens within the United States. *Id.* at *12–13 ("agree[ing] that First Amendment speech protections 'at a minimum apply to all persons legally within our borders.'") (citation omitted).

165. Dmarcian, Inc. v. Dmarcian Eur. BV, No. 1:21-CV-00067-MR, 2021 WL 3561182, at *1, 6 (W.D.N.C. 2021). Specifically, the Defendant pled that the First Amendment injury would flow from the injunction having the effects of "forcing [the Defendant] to post statements about the Plaintiff's intellectual property and prohibiting the Defendant from making public statements about the Plaintiff." *Id.* at *6 (citation omitted).

166. *Id.* at *6–7 (citing *AOSI II*, 140 S. Ct. 2082, 2086 (2020); *Boumediene*, 553 U.S. 723, 770–71 (2008)). Insofar as the judge invokes *AOSI II* for the bedrock principle, cites

Unlike these cases, the Sixth Circuit's June 2021 decision in *Baaghil v. Miller* was not a First Amendment suit. The appeal was brought by a permanent resident who sought to challenge a U.S. consulate's denial of visas he had requested for his wife and child in Yemen.[167] Under the "consular non-reviewability" doctrine, judges cannot hear such requests unless the decision at issue "implicates the constitutional rights of [U.S.] citizens or lawful permanent residents."[168] In its opinion, the Sixth Circuit held that none of the father's rights were violated since "American residents—whether citizens or legal residents—do not have a constitutional right to require the National Government to admit noncitizen family members into the country."[169] However, the court did not even conduct a rights-specific analysis to decide whether the mother and child could "invok[e] their own federal constitutional rights."[170] For that "distinct" holding, *AOSI II* provided the rule: "Noncitizens living abroad do not have any American constitutional rights."[171]

Perhaps *Baaghil* forecloses an argument that *AOSI II* only applies when a noncitizen invokes the First Amendment, but it is also likely no one would ever advance that theory. First, *AOSI II* contains relatively little First Amendment-specific analysis,[172] and the analysis it does contain is framed as a reply to a counterargument suggesting it is dicta.[173] Second, there is also a longstanding belief that freedom of speech is among the strongest candidates for global recognition: proponents date back to Kant,[174] and

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to *Boumediene* immediately thereafter, and emphasizes the defendant's lack of connections to the United States, thus channeling the *Verdugo-Urquidez* plurality, *Dmarcian* is a less straight-forward application of *AOSI II* than *In re Google LLC*.

167. Baaghil v. Miller, 1 F.4th 427, 430 (6th Cir. 2021).

168. *Id.* at 432.

169. *Id.* at 433 (citing Kerry v. Din, 576 U.S. 86, 96–97 (2015) (plurality opinion)).

170. *Id.* (citing *AOSI II*, 2082 S. Ct. at 2086).

171. *Id.*

172. The Court at times describes its holding with specific reference to the First Amendment. *AOSI II*, 140 S. Ct. 2082, 2087 (2020) ("Th[e] two bedrock principles . . . together lead to a simple conclusion: As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment.").

173. *Compare id.* at 2082–89 (lacking any analysis of the Amendment's original intent or text), *with* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990) (plurality opinion) (analyzing intent and text of the Fourth Amendment to determine the Warrant Clause's reach), *and* Boumediene v. Bush, 553 U.S. 723, 739–43 (2008) (analyzing text, history, and common law understanding of the writ of habeas corpus to determine the Suspension Clause's reach).

174. IMMANUEL KANT, *Second Supplement: Secret Article of a Perpetual Peace,* in TOWARD PERPETUAL PEACE (1795) ("The state . . . will allow [people] to speak freely and publicly . . . . [N]o special formal arrangement among the states is necessary . . . for the agreement already lies in the obligations imposed by universal human reason in its capacity as a moral legislator.").

several scholars advanced discrete arguments for its extension to noncitizens abroad after *Boumediene*.[175] Plus, some Courts of Appeals—and arguably the Court itself—have *already* afforded extraterritorial First Amendment rights to noncitizens in some fashion or another.[176]

By comparison, the D.C. Circuit's August 2020 decision in *Al Hela v. Trump* is likely to concern proponents of the noncitizens' extraterritorial Constitution.[177] In *AOSI II*, the Court recognized a single exception to the bedrock principle for "certain constitutional rights" that "may . . . sometimes" reach noncitizens in de facto American territories like

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175. *See, e.g.*, Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1378–79, 1386–93 (2014) (applying a fundamental rights framework to argue that "the negative First Amendment" should apply extraterritorially to noncitizens as the Court has been effective in balancing competing prerogatives of national security and individual liberty in its related First Amendment jurisprudence); Neuman, *supra* note 19, at 394 n.117 (arguing that a global due process framework that uses the ICCPR as a baseline would make several "versions of First Amendment rights to . . . free expression and association" likely candidates for extraterritorial application to noncitizens); A. Louis Evans, *Fighting Words: Targeting Speech in Armed Conflict*, 30 WASH. INT'L L.J. 598, 631 (2021) (arguing that "speech-driven [lethal] targeting decisions, regardless of [a target's] location or nationality . . . [,] should [satisfy] First Amendment standards"); *see also* Timothy Zick, *Territoriality and the First Amendment: Free Speech at – and Beyond – Our Borders*, 85 WM. & MARY 1543, 1546–47, 1567–68 (2010) (arguing that there already is an extraterritorial First Amendment for noncitizens as manifested in foreign libel judgment enforcement cases); *infra* notes 272–76 and accompanying text (discussing the cases that Zick relies upon more thoroughly).

176. *Compare supra* notes 96–97 and accompanying text (describing Ninth Circuit's decision in Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 987, 997 (9th Cir. 2012), permitting a permanent resident to challenge the "No-Fly-List" designation under the First Amendment given the person's substantial voluntary connections to the United States), *infra* note 273 and accompanying text (describing decisions of several federal courts such as the D.C. Circuit in Matusevitch v. Telnikoff, 877 F. Supp. 1, 4–6 (D.D.C. 1995), declining to enforce a foreign libel judgment after finding it violated U.S. public policy—as embodied in the Supreme Court's First Amendment libel doctrine), *and infra* notes 189–204 and accompanying text (describing how a recent Ninth Circuit decision excluded defendant noncitizens from California's stalking statute under a First Amendment exception, despite their presence abroad during all relevant periods, in reliance on cases recognizing "the First Amendment right of domestic listeners to receive speech from foreign speakers," Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 744 (9th Cir. 2021) (citations omitted)), *with supra* note 95 and accompanying text (describing how Justice Thomas, writing individually in Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) (citations omitted), suggested that *Verdugo-Urquidez* precluded the extraterritorial reach of the Establishment Clause to noncitizens abroad).

177. Al Hela v. Trump, 972 F.3d 120 (D.C. Cir. 2020); *see also* Adam Chan, Al-Hela v. Biden *and Due Process at Guantanamo*, LAWFARE (May 25, 2021, 8:01 A.M.), https://www.lawfareblog.com/al-hela-v-biden-and-due-process-guantanamo [https://perma.cc/FHD2-TTX5] (describing the panel's reasoning).

Guantanamo Bay.[178] However unfaithful to *Boumediene*,[179] *AOSI II* opened the door for noncitizens to stretch that language to permit more than just the Suspension Clause's reach to Guantanamo Bay.

In *Al Hela*, however, the panel held that the Fifth Amendment's Due Process Clause did not reach a Guantanamo Bay detainee, [180] notwithstanding the fact that Al Hela was being detained in the very same "'territory' under the 'indefinite' and "complete and total control' and 'within the constant jurisdiction' of the United States" as Boumediene.[181] Instead, Judge Rao's opinion for the panel explicitly cited *AOSI II* for the bedrock principle, characterizing its rule as "subject to tightly limited exceptions," and followed *Eisentrager* in declining to hold that the "extraterritorial application of the Fifth Amendment" is one of those exceptions.[182] The panel's ruling might be attributable to the D.C. Circuit's unique history with *Boumediene*,[183] and it is not final. In April 2021, the D.C. Circuit vacated the decision in granting Al Hela's petition for a rehearing *en banc*.[184] Still, two members of a Court of Appeals panel rejected one of the narrowest possible interpretations of *AOSI II* that would permit constitutional rights for some noncitizens outside of the de jure United States, suggesting that other judges may not be inclined to apply the

178. *AOSI II*, 140 S. Ct. at 2086 (citing *Boumediene*, 553 U.S. at 770–71); *see also* Amanda L. Tyler, Thuraissigiam *and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 P.M.) (noting how *AOSI II* "seems to have relegated *Boumediene* to a small role in future cases[,]" one in which the decision only applies "to cases arising in territories under the full (even if not formal) control of the U.S. government") https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause [https://perma.cc/4SSW-TPSM].

179. *See supra* notes 75–82 and accompanying text.

180. *Al Hela*, 972 F.3d at 139.

181. *AOSI II*, 140 S. Ct. 2082, 2086 (2020) (citing Boumediene v. Bush, 553 U.S. 723, 755–71 (2008)); *cf.* Chan, *supra* note 177 ("The D.C. Circuit has heard several Guantanamo cases raising the due process issue, although prior to *Al Hela*, it had declined to settle definitively whether Guantanamo detainees have due process rights.").

182. *Al Hela*, 972 F.3d at 139 (first citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001); then citing Johnson v. Eisentrager, 339 U.S. 339, 784 (1990); then citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (plurality opinion); then citing *AOSI II*, 140 S. Ct. 2082, 2086 (2020); and then citing Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020)); *see also supra* notes 44–49, 72, 70, and accompanying text. In *Al Hela*, the panel applied *Boumediene* for its Suspension Clause analysis but still denied the habeas petition. *Al Hela*, 972 F.3d at 133–37.

183. *See supra* note 34 and accompanying text (quoting authorities describing Justice Kavanaugh's role).

184. Chan, *supra* note 177; *see also* Order, Al Hela v. Biden, No. 19-5079, slip op. at 2 (D.C. Cir. Apr. 23, 2021) (*en banc*) (granting petition for rehearing *en banc* and vacating order); Chan, *supra* note 177 (noting another Guantanamo detainee, "raising the same legal question, appealed the D.C. Circuit's [prior] denial of his due process claims" to the Supreme Court).

bedrock principle in the myriad situations that *AOSI II* does not explicitly frame as exceptions to the asserted rule.

The *Al Hela* panel also relied on the Court's decision in *Department of Homeland Security v. Thuraissigiam*, which the Court handed down just days before *AOSI II*. In *Thuraissigiam*, the Court interpreted the Suspension Clause for the first time since *Boumediene*, adopting a sweeping view of the plenary power to hold that a noncitizen detained "25 yards north of the [U.S.-Mexico] border" could not invoke the Suspension Clause despite being physically within the United States.[185] Then, having concluded that the noncitizen "had no right to be in court at all," the Court reasoned that "there was no need for it to consider his Due Process claim."[186] Scholars have widely criticized the decision,[187] but most concede that it "calls into question several aspects of . . . *Boumediene*."[188] As such, the breadth of *AOSI II*'s *Boumediene* exception and the prospects for global due process must both be colored by *Thuraissigiam*.

Perhaps scholars' persuasive arguments for declining to apply *AOSI II* in any cases that implicate the noncitizens' extraterritorial Constitution are still too underdeveloped to persuade judges. However, the cases discussed in Part II.A show that—however unpersuasive, unfaithful to precedent, contrary to the Court's tradition of narrow rulings in this field, and, to some, careless in its dicta—cursory citations to *AOSI II* have already justified rights-preclusive reasoning in cases where noncitizens have sought extraterritorial constitutional protections.

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185. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020); Arulantham & Cox, *supra* note 21 (describing countervailing plenary power cases).

186. Arulantham & Cox, *supra* note 21.

187. *See, e.g.*, Schroeder, *supra* note 144, at 74 ("*Thuraissigiam* is particularly threatening; if we are not careful the despicableness of opinions such as *Thuraissigiam* alone, like a manmade *Leviathan*, can swallow the nation whole"); *see also* Chinyere Ezie, *Not Your Mule? Disrupting the Political Powerlessness of Black Women Voters*, 92 UNIV. COLO. L. REV. 659, 703 (2021) (calling the 7-2 decision, in which Justices Breyer and Ginsburg voted with the Court's conservatives but penned a separate concurrence, "an important reminder that even the Court's liberal justices have shied away from demanding robust enforcement of civil and human rights").

188. *See* Tyler, *supra* note 178 ("[*Thuraissigiam*] . . . generally signals a more limited vision of the Suspension Clause than *Boumediene* embraced."); Ezie, *supra* note 187, at 703 n.211 ("By denying habeas remedies and a meaningful judicial challenge, the *Thuraissigiam* decision . . . casts doubt on the ongoing validity of *Boumediene* . . . .") (citing Boumediene v. Bush, 553 U.S. 723 (2008)); Arulantham & Cox, *supra* note 21.

B. Enduring Shards of the Noncitizens' Extraterritorial Constitution: Three Potential Routes

During the same period, other federal judges have refrained from invoking the bedrock principle in cases where it could conceivably be applied. In just two recent cases, the Second and Ninth Circuits have already laid the foundation for three different approaches to distinguishing *AOSI II*. Before turning to the Note's own analysis of *AOSI II*, Part II.B surveys the three different legal frameworks that these judges have presented.

1. Domesticating the Constitutional Claim of a Noncitizen Abroad

The first two rationales for distinguishing *AOSI II* both derive from *Thunder Studios v. Kazal* and reflect the division of a Ninth Circuit panel in September 2021. The appeal stemmed from a civil action brought by an Australian national who owned a movie studio in the state; he sued three brothers with whom he was once in business for damages under California's stalking statute.[189] Crucially, all of the plaintiff's harassment allegations involved extraterritorial conduct by the Australian defendants, such as sending threatening messages on the internet to the plaintiff and his employees, as well as hiring picketers to protest near and private investigators to surveil his California home—all from the United Arab Emirates and Australia.[190] After a civil trial in federal court, a jury found for the plaintiff on the stalking claims against two of the defendants, awarding $1.1 million dollars in damages against each of them.[191] The issue on appeal before the Ninth Circuit was whether the district court properly denied the defendants' renewed motion for judgment as a matter of law based on the court's conclusion that the actions were reasonably-perceptible as threats, and that the claims therefore ought to be excluded under the First Amendment exception to the California statute.[192] As the defendants "were outside the United States at all relevant times,"[193] the First Amendment defense implicated the post-*AOSI II* doctrine on the bounds of the noncitizens' extraterritorial Constitution.

As context, the Court has not explicitly decided the question of when a constitutional claim or defense becomes extraterritorial for the purposes of triggering an inquiry into whether the noncitizens'

189. Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 742 (9th Cir. 2021).
190. *Id.* at 741–42.
191. *Id.* at 740.
192. *Id.* at 742.
193. *Id.* at 743.

extraterritorial Constitution encompasses a given case.[194] In fact, one scholar has discerned four different patterns in the Court's decisions.[195]

In 2020, the Court strongly implied that its litmus test is whether a noncitizen is physically present outside of U.S. borders during the conduct relevant to the suit. In *AOSI II*, the Court refers to "foreign citizens *outside U.S. territory*" in its articulation of the bedrock principle.[196] Separately, there is also fodder to draw a consonant inference from the Court's decision in *Hernández II*, where the issue was whether a cross-border shooting presented a "new setting[]" for the extension of *Bivens*. The Court, in explaining that the "claims . . . assuredly arise in a new context", embraced the Fifth Circuit's description of the "cross-border shooting" as having had an "extraterritorial aspect."[197] A majority of the Court therefore appeared to understand a noncitizens' presence abroad, however far from the U.S. border, as legally imbuing their constitutional claim with extraterritoriality,[198] especially when the decision is contrasted with the dissent in *Hernández II*. Justice Ginsburg's analysis, citing traditional U.S.

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194. *Supra* note 13 and accompanying text.

195. To date, Kent has offered the most thorough inquiry into the question in an article on *Hernández II*, with four observations: first, "for non-U.S. citizens, Supreme Court case law seems to treat the location of the allegedly harmed individual as the primary factor." Andrew Kent, Hernández v. Mesa*: Questions Answered and Questions Avoided*, AM. CONST. SOC'Y SUP. CT. REV. 2019-2020, Feb. 3, 2021, at 187, 192 (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953); Johnson v. Eisentrager, 339 U.S. 763, 770–71, 776–77, 784 (1950); Fong v. United States, 149 U.S. 698, 724 (1893); Carlisle v. United States, 83 U.S. 147, 154 (1872)); second, "[i]n a case involving an alleged constitutional harm to a property interest—a search unreasonable under the Fourth Amendment—the Court treated the location of the property as determinative of whether extraterritorial application of a constitutional right was being sought[;]" *id.* at 192 n.22 (citing United States v. Verdugo-Urquidez, 494 U.S 259, 264 (1990) (plurality opinion)); third, "[t]o the extent tort principles are relevant . . . in the late eighteenth century when the Constitution was adopted, 'the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred'"; *id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 705 (2004)); and fourth, "[u]nder the traditional *lex loci* approach, the place of the wrong for torts involving bodily harm is 'the place where the harmful force takes effect upon the body.'" *Id.* (citing Restatement (First) of Conflict of Laws § 377, Note 1 (Am. L. Inst. 1934)).

196. *AOSI II*, 140 S. Ct. 2082, 2086 (2020).

197. *See Hernández II*, 140 S. Ct. 735, 741, 743–44 (2020) (endorsing the Fifth Circuit's description of the case—a cross-border tort where the plaintiff was on the Mexican side of the border and the shooter was on the U.S. side—as having an "extraterritorial aspect" in distinguishing it from contexts where the Court has extended *Bivens*) (citation omitted).

198. If the Court is comfortable assuming that a cross-border shooting is extraterritorial for the purposes of analyzing whether a noncitizen has rights under the Constitution, the Court seems likely to adopt that same assumption if a noncitizen is any further from the U.S. border.

choice of law principles, would have inferred the constitutional damages remedy because the purpose of imposing tort liability in this context is to deter misconduct by rogue U.S. officers, making the location of the defendant agent in *Hernández II* the more meaningful situs of the claim.[199]

As such, *AOSI II*, if strictly construed, seemed to bar the defendants' First Amendment defense in *Thunder Studios*. To the contrary, however, a majority of the panel held that the defendants could avail themselves of the First Amendment exception to the stalking statute because "the recipients of their speech and speech-related conduct were in California."[200] The panel notes several reasons why defining the defense as non-extraterritorial may have been uniquely appropriate on the case's facts. First, the panel was able to rely on Supreme Court decisions recognizing the First Amendment right of domestic listeners to receive speech from foreign speakers[;]"[201] second, those cases were applicable since there were not "national security concerns . . . at issue" in *Thunder Studios*;[202] and third, *AOSI II* was inapposite since it concerned restrictions on the extraterritorial speech of "foreign organizations operating abroad."[203] The analysis suggests that courts hearing cases on the bounds of the noncitizens' extraterritorial Constitution will not always be able to distinguish *AOSI II* by "'localiz[ing]' the law—that is . . . treat[ing] the case as a purely domestic issue that did not call for extraterritoriality" by "relying on the law's domestic effects.'"[204]

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199. The dissent argued "prescriptive jurisdiction reaches 'conduct that . . . takes place within [United States] territory,'" and that the "place of a rogue officer's conduct 'has peculiar significance' to [the] choice of the applicable law where, as here, 'the primary purpose of the tort rule involved is to deter or punish misconduct.'" *Hernández II*, 140 S. Ct. 735, 757 (2020) (Ginsburg, J., dissenting) (first quoting (citing Restatement (Third) of Foreign Rels. L. of the U.S. § 402 (Am. L. Inst. 1986), then quoting Restatement (Second) of Conflict of Laws § 145 cmt. E (Am. L. Inst. 1969)). One commentator has identified similar reasoning in the Ninth Circuit decision, discussed earlier, which held that a noncitizen could bring a Fourth Amendment unreasonable force claim on facts similar to those of the *Hernández* litigation. *See* Rachel Bercovitz, *Law Enforcement Hacking: Defining Jurisdiction*, 121 COLUM. L. REV. 1251, 1263 n.51 (2021) (interpreting the Ninth Circuit's decision in *Rodriguez v. Schwartz* as "appear[ing] to define the situs of the [Fourth Amendment] seizure by the site of the border patrol agent in Arizona . . . .").

200. Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 743 (9th Cir. 2021).

201. *Id.* (citing Kleindienst v. Mandel, 408 U.S. 753 (1972); United States v. One Book Called 'Ulysses', 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934)).

202. *Id.* at 743–44.

203. *Id.* at 744 (citing *AOSI II*, 140 S. Ct. 2082, 2087 (2020)).

204. *See* Ryan Walsh, *Extraterritorial Confusion: The Complex Relationship Between* Bowman *and* Morrison *and a Revised Approach to Extraterritoriality*, 47 VAL. U. L. REV. 627, 655–56 (2013) (explaining how the Court "circumvented extraterritoriality" in this manner in a 2010 case concerning the extraterritorial effect of a federal statute). *But see* Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1457 (2014) ("Extraterritorial application of constitutional

However, *Thunder Studios* speaks to a potential category of situations in which courts might viably extend a partial noncitizens' extraterritorial Constitution on more nuanced, subtler grounds than those proposed in Part II.A. Future scholarship and litigation may further illuminate the scope of this category.

2. Distinguishing Noncitizens with Substantial Connections to the United States

After *AOSI II*, a second class of cases in which the bedrock principle may not apply has received far more attention: the category in which noncitizens with sufficient voluntary connections to the United States seek constitutional protections abroad. Justice Breyer was the first to argue that the bedrock principle does not reach those cases in his dissent in *AOSI II*.[205] Prior to this Note, the only law journal article about *AOSI II* advanced the same argument as its thesis.[206] And relying upon the Ninth Circuit's 2012 decision in the case of the Malaysian student attending Stanford University,[207] the dissenter in *Thunder Studios* wrote the first opinion after *AOSI II* that is consistent with this paradigm for the recognition of a partial noncitizens' extraterritorial Constitution.[208]

The proponents of this view rely on two sets of authorities to argue that *AOSI II* "should not be read to foreclose extraterritorial constitutional protections for noncitizens with substantial U.S. ties, such as permanent residency, when they are abroad".[209] First, they construe the plurality opinion in *Verdugo-Urquidez* as having "at least left open the possibility that a noncitizen with stronger U.S. ties . . . might enjoy some of the constitutional protections abroad that citizens do"; as discussed earlier, the

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rules involves a set of considerations that differ in part from those relevant to extraterritorial application of statutory rules.").

205. *AOSI II*, 140 S. Ct. at 2100 (Breyer, J., dissenting).

206. *See generally* HARV. L. REV. ASS'N, *supra* note 31.

207. *See supra* notes 96–97 and accompanying text (describing Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 987, 997 (9th Cir. 2012), permitting a permanent resident to challenge their designation on the "No-Fly List" under the First Amendment in part due to the person's substantial voluntary connections to the United States).

208. *See* Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 751 (9th Cir. 2021) (Lee, J., dissenting) (describing how the Ninth Circuit "ha[d] previously extended *Verdugo-Urquidez*'s 'voluntary connection' standard to the First Amendment's right of free association" in the earlier case of the Stanford University student) (citing *Ibrahim*, 669 F.3d at 997).

209. HARV. L. REV. ASS'N, *supra* note 31, at 495–96, 497; *see also id.* at 495 (emphasizing that, while the Court's "broad, geography-focused language suggests that all foreign citizen lack any constitutional rights while abroad[,]" that principle "contradicts prior understanding that the scope of noncitizens' constitutional rights depend[] . . . also on their connections to the United States").

text of the opinion supports this reading but does not militate it.[210] Second, some proponents also cite cases like *Landon v. Plasencia* limiting the Executive's plenary power at the border and granting rights there to permanent residents given their extant U.S. connections.[211]

Setting aside the strength of these precedents, there are understandable reasons that this interpretation of *AOSI II* is so prominent. First, the disposition of *AOSI II* can be readily understood as an attempt by the Court's conservatives to undercut *Boumediene*'s sweeping claim that every individual in the world possesses rights under the Constitution unless a court decides ex post that practical concerns require otherwise; interpreting *Verdugo-Urquidez* in the proposed manner results in a much smaller universe of prospective extraterritorial rights-bearers, which would presumably be more palatable to a majority of the Court's current Justices. In this vein, the ease with which the *Thunder Studios* dissent reconciles the decision with *AOSI II* suggests some promise to the approach.[212] Second, the cases this view covers are arguably sympathetic situations to recognize protections for a noncitizen abroad. For example, it may permit the Fourth Amendment to reach a U.S. permanent resident's excessive force claim against a U.S. official for assault while the noncitizen was abroad, and it might open the door to the First Amendment reaching an international

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210. *Id.* at 496 (citation omitted). *Compare id.* at 495–96 (analyzing the support for this interpretation in the text of the *Verdugo-Urquidez* plurality opinion), *with supra* notes 91–95 and accompanying text (same, but also identifying statements in the plurality opinion that cut against a more rights-expansive interpretation).

211. HARV. L. REV. ASS'N, *supra* note 31, at 497 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)). In *Landon*, the Court held that permanent residents require greater procedural due process protections in exclusion hearings, even if they briefly left the United States, given their "develop[ing] . . . ties" to the country. *Landon*, 459 U.S. at 32; *see Affirmative Duties in Immigration Detention*, *supra* note 3, at 2490–91 ("*Landon* exemplifies a divergence from the strict application of the plenary power doctrine . . . ."); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 36 (2006) (describing the plenary power doctrine as "founded on strong notions of national sovereignty and clear separation between citizens who can claim protections under the U.S. Constitution and noncitizens who cannot.").

212. The dissenter's theory that the "First Amendment does not extend to [noncitizens] without substantial voluntary connections to the United States" is narrow, treating *AOSI II* as just another instance in which the "Court . . . reaffirmed th[e] extra-territorial limitation [of] constitutional rights" to "individual[s], [who,] at the very least, . . . have had some connection to the United States—whether it be presence on [U.S.] soil or some form of implicit allegiance to th[e] nation." *Thunder Studios, Inc.*, 13 F.4th at 751 (Lee, J., dissenting) (citation omitted).

student's claim against their federally-funded university for discrimination against the student while the student was home on break.[213]

Despite its appeal, the theory may suffer from certain limits. First, a popular reading of *Verdugo-Urquidez* maintains that it turned on the "textual exogenesis" of the phrase "the People" in the Fourth Amendment and Preamble; as a result, courts might only recognize extraterritorial rights for noncitizens with substantial connections to the United States if they are contained in constitutional provisions that include that phrase.[214] Second, there are reasons to doubt that the Court, if confronted with the issue, would actually interpret *Verdugo-Urquidez* as proposed. The conservative Justices have signaled—in *AOSI II* and elsewhere—that they understand the case to stand for a bright-line rule barring the Constitution's reach to noncitizens abroad.[215] While there are reasons to think that the nonparty NGOs in *AOSI II* had substantial connections to the United States, the Court considered none of them.[216] Finally, the Court's recent decisions in *Trump v. Hawaii* and *DHS v. Thuraissigiam* both rested on expansive notions of immigration deference, breaking new ground for the Court's understanding of the plenary power.[217]

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213. *See AOSI II*, 140 S. Ct. 2082, 2100 (2020) (Breyer, J., dissenting) (stating that the latter claim might challenge expulsion of "an unpopular political stance they took on social media while at home . . . .").

214. *See supra* note 94 and accompanying text; Arulantham & Cox, *supra* note 21. Presumably, the Court cites the Preamble in *AOSI II* to incorporate this textualist analysis from *Verdugo-Urquidez*. *AOSI II*, 140 S. Ct. at 2086 (citing U.S. CONST., pmbl.). In *Thunder Studios*, the phrase also played a key role in the dissenter's articulation of a voluntary connections standard for deciding whether the noncitizen defendants could invoke a First Amendment exception to the state stalking statute, suggesting that, even in a liberal circuit for this doctrine, this limiting construction of *AOSI II* will not persuade every judge to hold that a provision lacking the language "the people" can reach a noncitizen abroad. *Thunder Studios, Inc.*, 13 F.4th at 752–53 (Lee, J., dissenting) (citations omitted).

215. *See AOSI II*, 140 S. Ct. at 2087 (citing to the plurality opinion in *Verdugo-Urquidez* for the proposition that "it has never been the law" that a noncitizen can invoke the Constitution outside U.S. territory or Guantanamo Bay) (citations omitted); Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) ("The plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad.") (citation omitted).

216. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (plurality opinion).

217. *See* Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, 2 AM. CONST. SOC'Y SUP. CT. REV. 161, 180–81 (2017–2018) (describing how the novel standard of review applied in *Trump v. Hawaii* permits the Court to "uphold an immigration policy that would have been unconstitutional under ordinary constitutional review at the time" on the basis of the plenary power doctrine); *see supra* notes 185–87 and accompanying text (describing *Thuraissigiam* further).

3. Relying on a Mutuality-of-Obligation Theory

The recent Second Circuit panel opinion in *United States v. Bescond* is the other instance in which a court has distinguished the bedrock principle in extending a constitutional right to a noncitizen abroad after *AOSI II*. Initially, a Second Circuit motions panel denied the appeal by the defendant, who was indicted for violations of the Commodity Exchange Act in the United States while still a fugitive in France, challenging her disentitlement by federal prosecutors.[218] On appeal, the issue before the panel was whether it had jurisdiction to hear the appeal under the collateral order doctrine, a question turning in this case on whether disentitlement without appeal would burden the defendant's rights under the Due Process Clause.[219]

Like in *Thunder Studios*, the panel split on whether the Constitution reached a noncitizen who was abroad. For one member of the panel, the bedrock principle settled the issue: per their dissenting opinion, *AOSI II* "makes clear that any rights [that] Bescond can claim under the Constitution will attach only when she travels to the United States to defend herself" in court, and so the panel lacked jurisdiction to hear her appeal.[220] For a majority of the panel, however, *AOSI II* was distinguishable because Bescond was "not a free-floating foreigner invoking the jurisdiction of [U.S.] federal courts to vindicate a Constitutional right," since it was "the *government* that invoked such jurisdiction when it pursued indictment."[221] Thus, the panel held that the Due Process Clause reached her abroad, and, in doing so, created a circuit split on "whether fugitive disentitlement orders . . . are immediately appealable" in such cases.[222]

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218. United States v. Bescond, No. 19-1698, 2021 U.S. App. LEXIS 23162, at *3 (2d Cir. Aug. 5, 2021).

219. *Id.* at *3–4.

220. *Id.* at *14 n.4 (Livingston, C.J., dissenting in part) (citing *AOSI II*, 140 S. Ct. at 2087).

221. *Id.* at *5.

222. *Id.* at *11; John M. Hillebrecht et al., United States v. Bescond *Addresses "Fugitive Disentitlement": Potential Game Changer for Foreign-Based Defendants Facing US Charges*, DLA PIPER (Aug. 30, 2021), https://www.dlapiper.com/en/us/insights/publications/2021/08/us-v-bescond-addresses-fugitive-disentitlement/ [https://perma.cc/WU8E-6R57] ("[With] *Bescond*, the Second Circuit splits from the Sixth and Eleventh Circuits on whether a defendant can appeal a district court's reliance on the fugitive disentitlement doctrine . . . . [The contrary] decisions both held that the Court of Appeals lacked jurisdiction to hear interlocutory appeals from rulings that disentitled fugitives."). The decision may not be the Second Circuit's final word in this case: while this Note was being finalized for publication, the Government filed a petition for an *en banc* panel to rehear the appeal. Petition of the United States for Rehearing *En Banc*, United States v. Bescond, No. 19-1698 (2d Cir. Oct. 4, 2021). Notably, the Government's pleading does not invoke *AOSI II* in its argument for rehearing. *Id.* at 8–17.

The decision is notable because the majority on the panel did not rely on *Boumediene* for a global due process approach to the issue as counsel for Bescond had advocated in their pleadings without addressing *AOSI II*.[223] Instead, the decision sounds in mutuality-of-obligation theory, the idea that the Constitution can reach a noncitizen abroad when the Government asserts an obligation that the person obey its authority.[224] This theory is reflected in some of the Court's opinions but has not been as influential as the Court's global due process and voluntary connections frameworks.[225] However, the Second Circuit seems to draw on this theory in *Bescond* in some of its reasoning: "Bescond is a defendant in a U.S. criminal court. As such, she is not without rights."[226] Perhaps, as a third alternative to distinguishing the bedrock principle, scholars and courts may begin to develop the scope of this theory further in the aftermath of *AOSI II*.

III. Reconciling *AOSI II* and the Case Law: A Shift in Separation of Powers Logic

Without foreclosing any of these arguments that cabin the bedrock principle, this Note concludes by exploring another interpretation of *AOSI II*, which might more appropriately foreground the role of separation of powers in the Court's reasoning. Like much of the post-*Boumediene* literature, all three proposals described in Part II.B focus near-exclusively

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223. The pleadings adopted the position that *Boumediene* and Justice Kennedy's *Verdugo-Urquidez* concurrence provide the general framework for deciding if a constitutional provision reaches a noncitizen abroad. Brief for Defendant-Appellant, United States v. Bescond (No. 19-1698), 2019 WL 4597403, at *43–44 (citing Boumediene v. Bush, 553 U.S. 723, 763 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring)).

224. Falkoff & Knowles, *supra* note 15, at 869; *see* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 9 (1996) (explaining how the obligation generates a presumption in favor of extending the constitutional right to the noncitizen, which the Government may rebut with "specific textual or other arguments [that] may exceptionally demonstrate that a particular right is either reserved to citizens or geographically limited"); Lobel, *supra* note 87, at 312–14 ("While the mutuality approach . . . expands the national community to include persons the government seeks to impose our law on, it fundamentally derives from the social contract premise that constitutional rights only affix to members of our national community—either broadly or narrowly conceived.").

225. For examples of mutuality-of-obligation reasoning in the Court's decisions, see *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) (arguing that the defendant was "entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws"); Falkoff & Knowles, *supra* note 15, at 882 (identifying traces of mutuality-of-obligation theory in *Boumediene*).

226. United States v. Bescond, No. 19-1698, 2021 U.S. App. LEXIS 23162, at *14 (2d Cir. Aug. 5, 2021).

on the rights-based logic that the Court employs in *AOSI II*.[227] Narrowly focusing on that logic may, however, serve to "obscure the theoretical foundations of the approach to extraterritoriality employed by the Court": judicial deference in the realm of foreign affairs.[228]

In *AOSI II*, the Court addresses separation of powers in two instances; because neither is dictum, both analyses warrant further discussion. First, the Court immediately follows an expression of the bedrock principle with the justification: "If the rule were otherwise, actions by [U.S.] military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U.S. Constitution."[229] Second, a later paragraph explains how the Court's "conclusion corresponds to historical practice regarding [U.S.] foreign aid."[230] Unlike the Court's First Amendment analysis and its discussion of whether the U.S. NGOs' rights were at stake, neither reference to separation of powers is cast as a counterargument.[231] As such, the Court at least opened the door for an argument that the bedrock principle is not a justifiable framework either when recognition of a right would facially have no bearing on the conduct of "U.S. military, intelligence, and law enforcement" abroad, or when a judicial role in constraining an act of U.S. foreign policy "corresponds to [the] historical practice" of the relevant branches.[232]

Part III explores the possible content, explanatory power, and shortcomings of reading *AOSI II* as a separation of powers decision for the future of the noncitizens' extraterritorial Constitution. Part III.A shows how *AOSI II* is distinct among the Court's decisions on the noncitizens' extraterritorial Constitution in the extent to which it rests on interbranch historical practice, a mode of constitutional interpretation that the Court has endorsed in other separation of powers cases. Part III.B suggests that, viewed in light of this canon, *AOSI II* may be regarded as both correctly decided and also not a bar to the Constitution reaching noncitizens abroad in other scenarios. Part III.C then addresses some limits to this interpretation.

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227. *See* Falkoff & Knowles, *supra* note 15, at 874 (suggesting that rights-based frameworks have been the predominant lens through which the doctrine for bounding the noncitizens' extraterritorial Constitution has been understood over time); Neuman, *supra* note 5, at 965 (same).

228. *See* Falkoff & Knowles, *supra* note 15, at 879 (making an analogous point with regard to *Boumediene*).

229. *AOSI II*, 140 S. Ct. 2082, 2086–87 (2020).

230. *Id.* at 2087–88.

231. *Compare id.* at 2088–89, *with id.* at 2086–88.

232. *Id.* at 2086–87.

A. Locating *AOSI II* in the Supreme Court's Separation of Powers Jurisprudence

The first reference to separation of powers in *AOSI II* invokes the longstanding principle of judicial deference to the other branches in matters of foreign affairs and especially national security.[233] This is a well-settled principled even though a competing strand of separation of powers case law stresses the importance of judicial review to protect minority rights and promote limited government.[234] The reasons that courts may choose to decline to review acts implicating foreign affairs include both the Constitution's explicit allocation of foreign affairs authority to only the political branches,[235] and prudential factors such as judges' informational disadvantage in the international arena.[236] The Court's decisions declining review of the other branches' actions on these bases vary in whether they express a formal bright-line rule as the basis or open the door to some level of judicial scrutiny in future cases with similar facts.[237]

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233. *Id.* at 2086–87.

234. *See* Stephen Cody, *Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security*, 6 U. PA. J.L. & PUB. AFFS. 643, 665–66 (2021); David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1332–33 (2008) (emphasizing judicial review plays an essential role in protecting liberty interests in times of crisis). *But see* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1767 n.67 (2015) (arguing that the Founding-era conception of judicial review was that courts should only invalidate legislation on constitutional grounds in cases of clear legislative or executive overreach).

235. The Constitution does not explicitly mention "national security" or "foreign affairs," but it locates those powers that are most relevant to conducting foreign policy in the political branches. *See* PETER M. SHANE ET AL., SEPARATION OF POWERS LAW: CASES AND MATERIALS 709 (4th ed. 2018) (listing examples, such as Congress' powers under Article I to "provide 'for the common defense,'" "to regulate commerce with foreign nations" and "to declare war," as well as the President's "power of Commander in Chief" and "authority to make treaties" under Article II). The Constitution suggests that the Framers wanted "sensitive issues of state" to be resolved in federal courts. *See id.* at 710 (highlighting Article III's grant of jurisdiction to the Supreme Court over "all cases affecting Ambassadors, other public Ministers, and Consuls"); Lee, *supra* note 36, at 1898, 1916, 1922, 1927 (arguing that, for the Framers, federal jurisdiction over cases involving foreigners was a defining feature of the federal judiciary). However, Article III does not give courts "any explicit power to make foreign policy." SHANE ET AL., *supra* at 710.

236. This is said to hold particularly true when the Government claims a case involves national security, and especially during emergencies, since judges lack access to intelligence. Cody, *supra* note 234, at 666–70; Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 1000–01 (2018).

237. *See* Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) ("[T]he modern Court . . . [is] seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called 'functional' approach . . . designed to do little more than

In the Court's past cases on the noncitizens' extraterritorial Constitution, the principle has been a longstanding theme. Both the *Eisentrager* Court and the *Verdugo-Urquidez* plurality, as well as the *Boumediene* dissenters, cited concerns about interference in foreign policy as grounds to reject the extension of extraterritorial rights to noncitizens.[238] *Boumediene* can also be read as a separation of powers case that responds those arguments, its instruction being that, even when a case involves national security, judicial review may be appropriate given the principle of limited government.[239] In sum, while rights-based understandings of constitutionalism have traditionally featured more heavily than these separation of powers concerns in the Court's decisions on the noncitizens' extraterritorial Constitution,[240] the Court did not break new ground in *AOSI II* by invoking judicial deference in foreign policy as a basis for the bedrock principle.[241]

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rationalize incursions by one branch of the federal government into the domain of another."); *see also* Fallon, Jr., *supra* note 234, at 1822 ("A variety of constitutional doctrines, prominently including standing and the political question doctrine, sometimes preclude the [judiciary] from saying what the law is . . . .").

238. *See* Johnson v. Eisentrager, 339 U.S. 763, 874–75 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (plurality opinion) (expressing concern about the consequences on foreign relations if the Court held that the Warrant Clause reached the noncitizen's Mexican residence); Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (stating that *Boumediene* "will almost certainly" make the Commander in Chief's job harder and that "more Americans [will] be killed [due to the] . . . decision"); *id.* at 801, 806 (Roberts, C.J., dissenting).

239. *See* Falkoff & Knowles, *supra* note 15, at 2010 (interpreting *Boumediene* "as embodying a limited government approach, rather than a rights-based approach, to defining the global reach of the Constitution"); *Boumediene*, 553 U.S. at 765 (declaring that the Constitution does not give the political branches authority "to decide when and where its terms apply" as constitutional restrictions ensure they do not exercise "absolute and unlimited" power, "[e]ven when the United States acts outside its borders"); STEPHEN BREYER, THE COURT AND THE WORLD 78 (2015) (calling *Boumediene* "the most important [case] by far" in its lineage because the "Court . . . went beyond the *Steel Seizure* cases" in saying that "even amid serious security threats, the Constitution does not give the President (or Congress) a blank check to determine the response"). The assertion of judicial review in *Boumediene* was especially pronounced given that Congress and the President acted in unison. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (Jackson, J., concurring) (1952) (stating that the President's "authority is at its maximum[]" when "act[ing] pursuant to an express or implied authorization of Congress . . . for it includes all that he possesses in his own right plus all that Congress can delegate."); *supra* note 69 and accompanying text.

240. *Supra* note 227 and accompanying text; *see also* Parts I.A–B (describing these approaches).

241. To the contrary, conservative judges and thinkers have been extremely vocal in presenting this logic as a ground for non-recognition of any noncitizens' extraterritorial Constitution since September 11. *See supra* note 34 and accompanying text; Raymond Randolph, *The Guantanamo Mess*, NAT'L REV. (Sept. 6, 2011, 8:00 A.M.),

In contrast, *AOSI II*'s second discussion of separation of powers, which is implicit in the Court's analysis of how its "conclusion corresponds to historical practice regarding [U.S.] foreign aid," is more distinct among the Court's decisions on the noncitizens' extraterritorial Constitution.[242] The analysis applies an interpretive canon that the Court has embraced in other areas of constitutional law, whereby "longstanding historical practice can at least sometimes constitute a 'gloss' on constitutional language[,]" and the practices "need not necessarily [have] originate[d] in the near aftermath of the Founding."[243] Justice Frankfurter coined the term "gloss" in *Youngstown* when he wrote that the Court may treat a "systematic, unbroken" presidential practice that has "never before" been questioned as "a gloss on 'executive Power'" as authorized by the Constitution.[244] "As an empirical matter," historical "gloss" reasoning features most often in separation of powers decisions,[245] which might be justified on the view that the Constitution "contemplates that practice will integrate the dispersed powers into a workable government."[246]

After *Youngstown*, the Court has often relied on evidence of a historical "gloss" to decide limits to the constitutional authority of other branches. In the domestic context, the Court recently looked to interbranch

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https://www.national
review.com/2011/09/guantanamo-mess-raymond-randolph/ [https://perma.cc/W8RP-3LQJ] (expressing criticism of *Boumediene* in a personal piece by another Bush-appointed judge on the D.C. Circuit); Cliff Sloan, "This 'Adequate' Substitute for Habeas," SLATE (June 24, 2008, 11:30 P.M.), https://slate.com/human-interest/2008/06/this-adequate-substitute-for-habeas.html [https://perma.cc/DZ9B-DKTF] (quoting then-Republican presidential nominee John McCain for his statement that *Boumediene* was "one of the worst decisions in history").

242. *AOSI II*, 140 S. Ct. 2086, 2087–88 (2020) ("Acting with the President . . . Congress sometimes imposes conditions on foreign aid . . . [based on] a foreign organization's ideological commitments . . . pro-democracy, pro-women's rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U.S. foreign aid serves U.S. interests." (internal citations omitted)).

243. Fallon, Jr., *supra* note 234, at 1778.

244. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). Frankfurter's concurrence is arguably the most famous authority for the validity and importance of historical gloss in constitutional adjudication. Fallon, Jr., *supra* note 234, at 1775–76; Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–05 (2013).

245. *See* Fallon, Jr., *supra* note 234, at 1777; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

246. *Youngstown*, 343 U.S. at 610, 635 (Jackson, J., concurring).

practice in deciding *Trump v. Mazaars* and *NLRB v. Noel Canning*.[247] Salient to the noncitizens' extraterritorial Constitution, the Court has also invoked the "gloss" canon in cases about the scope of the President's foreign affairs authority, such as *Dames & Moore v. Regan*.[248]

The Court's reliance on this canon in *AOSI II* is not a complete deviation from the Court's other cases discussed in Part I. In *Boumediene*, the Court opened the door for historical "gloss" to have some bearing on the bounds of the noncitizens' extraterritorial Constitution. However, given that Justice Scalia's dissent in *Boumediene* opposed the use of any post-Founding history as authority to decide the extraterritorial reach of the Suspension Clause,[249] the Court's reliance on the historical "gloss" of interbranch practice in foreign aid to decide *AOSI II* might be consequential. The analysis makes it conceivable that this Court, despite its hostility to the noncitizens' extraterritorial Constitution, may nonetheless be open-minded if presented with a persuasive argument that, unlike in *AOSI II*, extending the bedrock principle in a different context would not "correspond[] to [the] historical practice" of the U.S. Government's branches.[250]

B. Assessing the Merits of Foregrounding the Separation of Powers Logic in *AOSI II*

The analysis in Part II.B regarding the historical "gloss" of interbranch practice of foreign aid further illuminates how the *AOSI II* decision coheres with the broader doctrine of the noncitizens' extraterritorial Constitution. This inquiry identifies three analytical

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247. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (quoting NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); Fallon, Jr., *supra* note 234, at 1776–77.

248. *See* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries"[,] and "there has . . . been a longstanding practice of . . . [doing so] by executive agreement without the advice and consent of the Senate."); Fallon, Jr., *supra* note 234, at 1775 n.117 (discussing other historical "gloss" decisions in separation of powers cases).

249. Boumediene v. Bush, 553 U.S. 723, 746 (2008) (noting that past Supreme Court decisions "ha[d] been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ") (citation omitted); *id.* at 832 (Scalia, J., dissenting) (suggesting the Court had "no choice to affirm" challenged provision over invocation of Suspension Clause upon determination that originalist authorities did not unambiguously demonstrate its constitutionality); *see also* Fallon, Jr., *supra* note 234, at 1821–23 (explaining Scalia's view that the Court, after acknowledging it could not find conclusive evidence the Founders would have viewed the MCA as unconstitutional, should have stopped there).

250. *AOSI II*, 140 U.S. 2082, 2087–88 (2020).

advantages to reading *AOSI II* in this way. First, a more thorough articulation of the historical practice of foreign aid provides a narrow reason to think that *AOSI II* was correctly decided without broadly construing the bedrock principle. Second, an appreciation for the role of historical "gloss" explains why courts may still extend constitutional rights to noncitizens abroad in certain contexts. Finally, for better or worse, the interpretation may explain why the decision is more cogent than the Court's past decisions limiting the noncitizens' extraterritorial Constitution.

1. Consistency with Prior Interbranch Practice in U.S. Foreign Aid

Even those who view *AOSI II* as an immoral decision and sharp deviation from precedent may develop a greater appreciation for its holding when understood against the historical "gloss" of U.S. foreign aid. The decision's analysis on this point leaves much to be desired: the crux of the argument is that Congress has historically worked with the President in setting foreign aid policy and that this sometimes involves imposing conditions upon recipients,[251] but some of the Court's comments in the analysis lack a nexus to that argument.[252] The Court's argument makes much more sense given further context about the political branches' longstanding historical practice of independently setting conditions on the receipt of foreign aid and a greater appreciation for the link between foreign aid and national security.[253]

The *AOSI II* majority itself provided several clues as to why the past practice of U.S. foreign aid can be understood as essential to the holding in *AOSI II*. For instance, one piece of legislation cited in the decision very explicitly contemplates that any conditions imposed in furtherance of the legislation will be decided by the cooperation of both political branches.[254]

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251. The decision portrays Congress' use of "conditions on foreign aid" with the President's involvement as routine and instrumental to its role in foreign policy. *See id.* at 2087 (invoking four statutes as evidence) (citations omitted).

252. The fact that the "United States supplies more foreign aid than any other nation in the world" does not bear on interbranch practice, and just because Congress "*may* condition funding on a foreign organization's ideological commitments—for example pro-democracy, pro-women's rights, anti-terrorism, pro-religious freedom, [or] anti-sex trafficking"—does not speak to whether Congress has historically done so. *Id.* at 2087–88.

253. *Id.* at 2092 ("Congress' Article I spending power 'includes the authority to impose limits on the use of [federal] funds' . . . even conditions that 'may affect the recipient's exercise of its First Amendment rights.'") (citation omitted).

254. *See* 22 U.S.C.A. § 2272 ("In carrying out this section, the President shall consult with the Congress in regard to progress toward the [Act's stated]

Separately, at oral argument Justices Alito and Kavanaugh raised a number of hypotheticals regarding how the Court's holding could jeopardize the political branches' ability to achieve both security and non-security-related foreign policy goals by rendering extant foreign aid conditions unconstitutional.[255] Together, these citations and questions begin to paint judicial deference in foreign aid as consonant with a "longstanding" practice of it being handled without judicial interference.[256]

There is also ample evidence outside of the *AOSI II* record that, ever since the Marshall Plan, U.S. foreign assistance has been "one of the United States' most potent foreign policy tools."[257] American foreign aid has advanced a multiplicity of objectives, including the nation's humanitarian and economic goals, but many of its greatest successes have been in forging security alliances,[258] and more broadly in promoting national security.[259]

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objectives . . . and any conditions imposed on the furnishing of assistance in furtherance of those objectives.").

255. *See* Transcript of Oral Argument at 47, *AOSI II*, 570 U.S. 205 (2020) (No. 19-177) (Alito, J.) ("Suppose that the . . . United States provides grants to domestic entities and allows them . . . to make sub-grants to foreign schools for the purpose of promoting education in countries with weak educational systems . . . . Would that be unconstitutional?"); *see also id.* at 59 (Kavanaugh, J.) ("Suppose the U.S. government wants to fund foreign NGOs that support peace in the Middle East but only if the NGOs explicitly recognize Israel as a legitimate state. Are you saying the U.S. can't impose that kind of speech restriction on . . . NGOs . . . ?").

256. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

257. Lynne Dratler Finney, *Development Assistance–A Tool of Foreign Policy*, 15 CASE W. RES. J. INT'L L. 213, 213 (1983); Daniel F. Runde, "U.S. Foreign Assistance in the Age of Strategic Competition," CTR. STRATEGIC & INT'L STUD., at 2 (May 2020), https://csis-websiteprod.s3.amazonaws.com/s3fspublic/publication/20514_Runde_ForeignAssistance_v3_FINAL.pdf [https://perma.cc/B4PH-DHEY] (explaining that "the United States . . . provide[s] foreign assistance for reasons of enlightened self-interest").

258. *See, e.g.*, Runde, *supra* note 257, at 1 ("With U.S. assistance, countries such as Germany and Japan were able to successfully overcome the horrific damage of World War II and at the same time serve U.S. economic interests by becoming top trading partners and security allies.").

259. *See* George Ingram, What Every American Should Know About US Foreign Aid, BROOKINGS INST. (Oct. 15, 2019), https://www.brookings.edu/policy2020/votervital/what-every-american-should-know-about-us-foreign-aid/ [https://perma.cc/J49N-K689] (noting that foreign aid benefits "U.S. national security by supporting allies in promoting regional and global stability and peace," in addition to "providing humanitarian assistance to victims of war, violence, famine, and natural disasters" and mutually advancing "economic interests"); President Barack Obama, *Remarks by the President at the National Defense University*, WHITE HOUSE (May 23, 2013), https://obamawhitehouse.archives.gov/thepressoffice/2013/05/23/remarks-president-national-defense-university [https://perma.cc/CVS9-AEES] ("Foreign assistance cannot be viewed as charity. It is fundamental to our security."); Mike Mullen & James Jones, "Why Foreign Aid is Critical to U.S. National Security," POLITICO MAG. (June 12, 2017),

One of the main reasons that foreign assistance is such a potent instrument of foreign policy is the United States' practice of attaching conditions to foreign aid, providing leverage in relationships with foreign leaders.[260]

Moreover, in the United States, foreign aid policy and conditions have traditionally been handled as a political matter resolved by Congress and the Executive Branch.[261] For instance, there has been a longstanding partisan debate over the Mexico City Policy, which, similar to the Leadership Act's Policy Requirement, barred the receipt of federal funds by foreign NGOs who subcontracted with American NGOs if the foreign NGOs performed or actively promoted abortions.[262] When American NGOs challenged their role in imposing this condition that they disagreed with upon their foreign affiliates, "[n]one of the lawsuits were successful," in large part since courts sought to stay out of the highly-political process.[263] Recently, when the Trump Administration sought to cut a third of the

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https://www.politico.com/agenda/story/2017/06/12/budget-foreign-aid-cutsnational-security-000456/ [https://perma.cc/J44G-4CJW] ("Research suggests that investing in prevention [of extremist groups] is, on average, 60 times less costly than war and post-conflict reconstruction costs. It is also more difficult.").

260. *See* Jakob Urda & Zachary Lemonides, *In Defense of Development–A Response to "The Case for Unconditional Aid*," CHI. J. FOREIGN POL'Y BLOG, (May 24, 2018), https://thecjfp.com/2018/05/24/in-defense-of-development-a-response-to-the-casefor-unconditional-aid/ [https://perma.cc/4AWX-B9FD] (arguing that providing unconditional loans is unproductive); Ingram, *supra* note 259 (noting that in modern times foreign aid rarely goes to "corrupt, wasteful governments" because "when the U.S. wants to support a country that is ruled by a corrupt, uncooperative, or autocratic government, U.S. assistance goes through private channels—NGOs, other private entities, or multilateral organizations. Accountability of U.S. economic assistance is high . . . .").

261. *See* MARIAN L. LAWSON & EMILY M. MORGENSTERN, *Foreign Aid: An Introduction to U.S Programs and Policy*, CONG. RSCH. SERV. (Apr. 16, 2019), at 10–13, https://fas.org/sgp/crs/row/R40213.pdf [https://perma.cc/WD7Z-SMLE] (explaining the role of Executive Branch agencies in implementation of foreign aid programs); *id.* at 26–27 (explaining the role of Congress in determining appropriation levels and conditions for foreign aid programs); Mullen & Jones, *supra* note 259 ("Development experts under the auspices of USAID, State Department, . . . and other federal agencies must be fully committed to a coherent whole-of-government stability-enhancement strategy that will protect America's interests in the modern security environment while minimizing the exposure of our young men and women to harm . . . .").

262. The Mexico City Policy, introduced under President Reagan, barred receipt of federal funds for foreign NGOs who subcontracted with U.S. NGOs that performed or promoted abortions, "regardless of the source of the funds," but allowed "NGOs [to] do as they wish[ed] with their privately raised funds." Renee Holt, *Women's Rights and International Law: The Struggle for Recognition and Enforcement*, 1 COLUM. J. GENDER & L. 117, 127 (1991).

263. Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 601, 601 n.98 (2007) (cataloguing a series of cases that unsuccessfully brought such challenges to the Mexico City Policy on various legal theories).

foreign aid budget, Congress rebuffed the move after a heated political debate in which military leaders chimed in, citing national security impacts.[264]

Through this lens, the historical "gloss" of the political branches' longstanding practice of negotiating foreign aid conditions without judicial intervention can be understood as a key factor propelling the outcome of *AOSI II*. This reading of *AOSI II* foregrounds the classic role of the political branches in foreign aid policy as a reason why, despite the potential for Government abuse of the Policy Requirement,[265] a bright-line rule is appropriate in this particular context.[266] That does not necessarily mean, however, that the bedrock principle "corresponds to historical practice regarding" other U.S. Government actions that noncitizens abroad may challenge.[267]

2. Ability to Reconcile a Key Conceptual Tension in the Existing Case Law

Emphasizing separation of powers in analyzing *AOSI II* may explain the Court's jurisdictional due process cases and justify narrowing the bedrock principle in other contexts. The first of those items is primarily a conceptual contribution. After *AOSI II*, the judiciary is likely going to continue to apply the Court's jurisdictional due process case law totally undisturbed by the fact it permits a foreigner to invoke the Constitution abroad. Of course, the bedrock principle is difficult to square with the Court's 1987 decision in *Asahi Metal Industries*, which held that it was "unfair" under the Fourteenth Amendment for a state court to implead a foreign company precisely because the defendant was a corporate-

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264. *See* Mullen & Jones, *supra* note 259 ("[O]ur national experience . . . has shown clearly that development aid is critical to America's national security . . . . [S]evere cuts to USAID would only increase the risk to Americans and to our brave military service members. Congress should reject this dangerous path.").

265. *See* Brief of the Cato Institute as Amicus Curiae in Support of Respondents at 19–20, *AOSI II*, 140 S. Ct. 2082 (2020) (No. 19-177) (listing potential abuses, like a requirement that, to receive health services funding, NGOs must "give a disclaimer before administering vaccines stating that [they] are likely to do more harm than good").

266. *See* Heather Blakeman, *Speech-Conditioned Funding and the First Amendment: New Standard, Old Doctrine, Little Impact*, 13 NW. U. J. INT'L HUM. RTS. 27, 28 (2015) ("[Conditions that leverage funding to regulate speech outside the contours of the program exceed Congress's power under the Spending Clause, [but] they will . . . prevail with respect to foreign [NGOs] who implement U.S. foreign aid programs.") (internal quotations omitted).

267. *AOSI II*, 140 U.S. 2082, 2087–88 (2020).

noncitizen abroad.[268] Judges and scholars alike already struggle to reconcile the tension between the decision and the Court's broader doctrine on constitutional extraterritoriality for noncitizens before *AOSI II*.[269] A recent citation to *AOSI II* in a Fifth Circuit jurisdictional due process case expressed some interest in or confusion about the relationship,[270] but that case was ultimately decided under the rule of orderliness.[271] Maybe the solution is to note the lack of serious intervention by the political branches in response the Court's Constitutionalization of an outer bound to jurisdictional due process in *Asahi*. Unlike *AOSI II*, where the foreign aid context was an exclusive domain of the political branches, ensuring in personam jurisdictional fairness for foreign defendants has now been an undisturbed practice of the judiciary for decades, raising no notable interbranch conflict.

Perhaps more importantly, even some cases extending First Amendment rights to noncitizens abroad can be justified by a reading of *AOSI II* emphasizing separation of powers.[272] For the past several decades,

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268. *See, e.g.*, Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty., 480, U.S. 102, 113 (1987) (holding that it was "unfair" under the Fourteenth Amendment for a California court to implead a Japanese valve manufacturer for indemnification of a Taiwanese tire manufacturer's liability to a U.S. driver). These cases concern the noncitizens' extraterritorial Constitution because the Court has based its personal jurisdiction doctrine on the Due Process Clause. *See* Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 313 (1945).

269. *See* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1741–42 (2020) (characterizing "a doctrinal puzzle" in which "one line of caselaw [*sic*] makes very clear that foreigners abroad have no due process rights, while another holds that only foreigners are protected by due process from federal jurisdiction"); *cf.* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 816 (D.C. Cir. 2012) (evading tension in case law, where noncitizens abroad raised both jurisdictional due process and other Due Process Clause arguments, on waiver grounds); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 329 (2018) ("The Court has assumed, but never held, that foreign parties enjoy Due Process jurisdictional protections—an assumption in tension with the general rule that foreign parties acquire constitutional rights in proportion to their connections to the United States."). This is not a new tension after *AOSI II*: whereas substantial connections to the United States were a *predicate* to constitutional protections in *Verdugo-Urquidez*, the company having U.S. ties would have cut *against* constitutional protection in *Asahi Metal Industries*.

270. A Sixth Circuit panel recently heard a tort case involving a foreign defendant where the issue was whether jurisdictional due process case law decided under the Fourteenth Amendment controls in an analogous Fifth Amendment inquiry. Douglass v. Nippon Yusen Kabushiki Kaisha, 996 F.3d 289, 291–92 (5th Cir. 2021), *reh'g en banc granted, vacated*, 2 F.4th 525 (5th Cir. 2021). In a since-vacated order, the panel cited *AOSI II* for the proposition that "constitutional protections for non-U.S. parties in U.S. courts differ from those afforded to U.S. citizens." *Douglass*, 996 F.3d at 295 (citing Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981–83 (2020); *AOSI II*, 140 S. Ct. at 2086–87). If the bedrock principle is in fact good law, this is quite the understatement.

271. *Id.* at 292–300.

272. *AOSI II*, 140 S. Ct. 2082, 2087–88 (2020).

federal courts have refused to enforce noncitizens' judgments for libel claims rendered abroad on the basis that they are contrary to U.S. public policy.[273] Insofar as these decisions cite the Supreme Court's First Amendment decision in *N.Y. Times Co. v. Sullivan* as the basis for that conclusion, these decisions effectively held that the First Amendment reached extraterritorial claims of noncitizens.[274] Under a strict reading of the bedrock principle, that is flatly impermissible. However, if one approaches the cases with the understanding that *AOSI II* justified the principle by citing potential interference in "actions by American military, intelligence, and law enforcement personnel against" noncitizens, and on the "historical practice" of joint control over foreign aid conditions by the political branches, the libel judgment cases can be viewed as rightly-decided[275]—they were all civil cases in which U.S. officials were not parties, and there is now a thorough "historical practice" of courts extending rights in these cases.[276]

This logic for distinguishing the bedrock principle to hold that a constitutional right reaches a noncitizen abroad does not have equal force in every instance. The division of the Second Circuit panel in *Bescond* demonstrates both the promise and the limits of construing the bedrock

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273. *See* Zick, *supra* note 175, at 1586, 1586 n.250 (compiling cases in both district courts as well as federal Courts of Appeals); *see, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 478–80 (2d Cir. 2007) (recognizing that "[l]aws that are antithetical to the First Amendment" are unenforceable because they are "repugnant to public policy"); Matusevitch v. Telnikoff, 877 F. Supp. 1, 4–6 (D.D.C. 1995) (declining to enforce a foreign judgement because British libel standards are "contrary to U.S. libel standards" and thus "repugnant to public polic[y]"); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992) (holding "enforcement of the [foreign libel] judgement would violate the First Amendment . . . ."). *Compare* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) ("The standard for refusing to enforce judgments on public policy grounds is strict; defendants are rarely able to block judgments on these grounds."), *with* Kurt Wimmer, *The Long Arm of the European Privacy Regulator: Does the New EU GDPR Reach U.S. Media Companies?*, 33-SUM COMMC'N L. 16, 16, 19 (2017) (noting "courts have consistently refused to enforce UK orders related to libel, because English libel law is considered to be antithetical to First Amendment doctrine").

274. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264–67 (1964) (recognizing substantial First Amendment protections against libel claims, especially compared to other countries' standards); Zick, *supra* note 175, at 1588–89 ("U.S. judicial . . . approaches to libel tourism may effectively render *Sullivan* applicable to the entire world.").

275. Whether these cases were correctly-decided is only of theoretical significance today. *See* Peter Hay, *Forum Selection Clauses–Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law*, 35 EMORY INT'L L. REV. 1, 16 n.79 (2021) (noting that Congress eventually passed a federal statute that "adopted the reasoning of" one of these decisions) (citing 28 U.S.C.A. § 4102).

276. *AOSI II*, 140 S. Ct. at 2086–87.

principle narrowly as a separation of powers decision.[277] On the one hand, the bedrock principle may not be appropriate on the facts of *Bescond* since, unlike the political branches' historical practice of conditioning foreign aid without judicial involvement, courts have traditionally played a role in the disentitlement of foreign citizens.[278] This reading suggests some possible synergy between a reading of *AOSI II* that foregrounds the Court's reliance on interbranch practice and a mutuality-of-obligation understanding of constitutionalism.[279] On the other hand, the Second Circuit, in its denial of the prosecutors' request for disentitlement in *Bescond*, interfered to at least some extent with an action by American law enforcement personnel against a noncitizen abroad, an express concern of the *AOSI II* Court.[280] This analysis shows that the scope of cases in which courts may extend the noncitizens' extraterritorial Constitution on a separation of powers reading of *AOSI II* is not foreordained; it hinges on the relative weight placed on each of the separation of powers principles invoked in *AOSI II*: judicial deference in foreign affairs, and consistency with historical "gloss" of interbranch practice.

3. Ease of Longstanding Tension in the Rights-Based Approaches

A final advantage of this interpretation might not be construed as such by proponents of an extensive noncitizens' extraterritorial Constitution. As discussed in Part I, the holding in *Reid* presented the Court's conservatives with a theoretical challenge: these decisions represented the overthrow of the "strictly territorial model" of the U.S. Constitution because noncitizens had obtained a partial set of constitutional rights within the United States. Accordingly, a bright-line rule against recognizing any constitutional rights for noncitizens beyond the U.S. border was suddenly arbitrary, demanding a new logic of constitutionalism as a justification.[281] Perhaps by firmly demarcating the border as the line where

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277. For the prior discussion of *Bescond*, see *supra* Part II.B.3.

278. *AOSI II*, 140 U.S. 2082, 2087–88 (2020); Kiran H. Griffith, *Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement*, 36 SEATTLE U. L. REV. 209, 213 (2012) (tracing origins of the fugitive disentitlement doctrine to a Supreme Court case from 1876) (citing Smith v. United States, 94 U.S. 97, 97–98 (1876)); Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 753–55 (1997) (same) (citation omitted).

279. In general, in situations where a noncitizen abroad invokes a constitutional right in a legal proceeding and the Government is exerting an obligation over them, that proceeding is likely to be one that judges have historically administered. For prior discussion of mutuality-of-obligation theory in *Bescond*, see *supra* Part II.B.3.

280. *AOSI II*, 140 U.S. at 2086–87.

281. *See* Neuman, *supra* note 5, at 918.

separation of powers demand judicial deference, *AOSI II* subtly obviates the pressure for the Court to address that tension.

C. Potential Criticism of the Proposed Separation of Powers Interpretation

In that spirit, Part III concludes its examination of a separation of powers interpretation of *AOSI II* by raising a few possible criticisms of reading the decision in this manner: one is fact-specific; another concerns the bedrock principle's fidelity to history; and the third is pragmatic.

First, there is a strong argument that the Policy Requirement was, on its face, sufficiently detrimental to U.S. national security to justify judicial interference in the political branches' determination of foreign aid conditions. The argument, while not heavily emphasized by the plaintiff NGOs in their pleadings, is simple—per experts, the Policy Requirement undermines the efficacy of the Leadership Act's global anti-HIV advocacy,[282] and HIV/AIDS "represents an extraordinary national security threat" for reasons such as its destabilizing effect on societies.[283]

Second, there may be a viable argument that the "gloss" of U.S. history militates against the bedrock principle. After all, the nation's recent history includes the Court's embrace of globalism in *Boumediene*: a powerful testament to the judiciary's ability to balance liberty and national security interests,[284] especially given how many governments in the post-

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282. *See supra* notes 110–11 and accompanying text; *see generally* Brief of Professors of Public Health and Organizations Working in Public Health Policy and Implementation as Amici Curiae in Support of Respondents, *AOSI II*, 140 S. Ct. 2082 (2020) (No. 19-177), 2020 WL 1433476 (arguing that the anti-prostitution pledge hinders the public health community from achieving the Leadership Act's goal of eradicating HIV/AIDS).

283. Harley Feldbaum et al., *The National Security Implications of HIV/AIDS*, 3 PLOS MED. 0774, 0774 (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1475649/ [https://perma.cc/QSA2-3KTH] (arguing that HIV/AIDS detriments national security); Laurie Garrett, *HIV and National Security: What Are the Links?*, COUNCIL ON FOREIGN REL. (2005), http://catalogue.safaids.net/sites/default/files/publications/HIV%20and%20National%20Security.pdf [https://perma.cc/J8RY-QF23] (same); Robert F. Luo, *Understanding the Threat of HIV/AIDS*, JAMA (Oct. 2, 2002), https://jamanetwork.com/journals/jama/fullarticle/1845122 [https://perma.cc/582X-9ARL] (same).

284. *See* Cole, *supra* note 229, at 1357 (arguing, despite the Executive Branch's informational and expertise advantages in dealing with national security issues, courts are better-positioned to balance these interests); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 5 (2019) ("Judicial review is one of many mechanisms that remove from direct and immediate democratic accountability institutions that may be predictability compromised in the press of political expediency.").

9/11 era have used national security as a pretense to expand their authority.[285] On this view, the Court arguably deviated from the "gloss" of U.S. history when it articulated sharp limits to judicial review in *AOSI II* by invoking separation of powers, whereas the Court should have continued contracting the scope of judicial deference in foreign policy and immigration matters during the Trump administration.[286] Unfortunately, this argument must grapple with the nascency of the Court's decision in *Boumediene*, the country's longer history of anti-immigrant policies,[287] and the Court's own role in enabling those policies over time in discernably-xenophobic decisions.[288]

Finally, whereas the above critique targets the fidelity of *AOSI II*'s bedrock principle to the broader normative "gloss" of American history, another criticism might be that the Court is simply unlikely to narrowly construe the bedrock principle on separation of powers grounds. For two centuries, the Court has relied on fictional narratives about history to justify its expansive doctrines of judicial deference in the spheres of foreign affairs and immigration.[289] Against that backdrop, consider one of the *AOSI II*

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285. Cody, *supra* note 175, at 659 (noting that international empirical data shows national security reforms were passed "independent of incidents of political violence" after 9/11 rather than as a causal result).

286. *But see* Rodríguez, *supra* note 217, at 164 (noting how *Trump v. Hawaii* "accepts at face value the national security justification for the proclamation offered by the government in litigation, dismissing the copious evidence of the president's anti-Muslim intent as legally beside the point"); William J. Aceves, Hernández*,* Bivens*, and the Supreme Court's Expanding Theory of Judicial Abdication*, 119 MICH. L. REV. ONLINE 1, 7 (2020) (arguing the "understanding of judicial review" in *Hernández II* "removes judges from their historic roles as neutral actors").

287. Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 817–18 (2020) (noting the Trump administration's "immigration policies can be traced back . . . to the inception of plenary power and racial restrictions on immigration"); Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1556–57 (2021) (analogizing Trump's initial plan to exclude Muslims from the United States to the Chinese Exclusion Act).

288. *See supra* note 43 and accompanying text (collecting criticisms of the *Insular Cases*' doctrine as either imperialist or outwardly racist); Veneziano, *supra* note 2, at 606 (citing Cole, *supra* note 2, at 366–67) (explaining that "[c]ommon justifications for the distinction [between the citizens' and noncitizens' extraterritorial Constitutions] are based on . . . the 'deeply ambivalent approach of the Supreme Court, an ambivalence matched only by the alternately xenophobic and xenophilic attitude of the American public . . . .").

289. There is evidence that in the early years of American history even staunch proponents of presidential power recognized that Congress, rather than the Executive, had primacy in foreign affairs. Alexander Hamilton, *Letters of Pacificus and Helvidius, on the Proclamation of President Washington, No. 1* (June 29, 1793), *in* LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 5, 13 (J. & G.S. Gideon, 1845). *But see* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories,*

Court's citations for the principle of judicial non-interference in foreign affairs: a quote from *Eisentrager*, stating that the Constitution cannot apply to the whole world lest "irreconcilable enemy elements, guerilla fighters, and 'werewolves' demand First Amendment Rights."[290] If a majority of the present Court becomes concerned that judicial intervention to afford First Amendment protections to humanitarian organizations will set a precedent giving "werewolves"[291] and Nazis free speech rights, that same Court seems extremely unlikely to construe the bedrock principle narrowly on any basis.[292]

CONCLUSION

For the rest of President Biden's term, the impact of *AOSI II* upon the parties will abate if the Administration realizes its stated commitment to "end the laws, policies, and practices that make it harder for . . . sex workers . . . to receive the HIV services and support they need."[293] For

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and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 5 (2002) (describing how in United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 304 (1936), the Court "abandoned the traditional concept of a limited national government derived from enumerated and reserved powers and replaced it with a bifurcated division of . . . powers, in which traditional enumerated-powers analysis applie[s] only to U.S. domestic relations"); Julian D. Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169–70 (2019) (explaining how for two centuries "advocates of presidential power have claimed that [the vesting of the 'executive power'] was originally understood to include a bundle of national security and foreign affairs authorities . . . [b]ut as a matter of well-established legal semantics, that term was 'prerogative,' [not 'executive'].").

290. *AOSI II*, 140 S. Ct. 2082, 2087 n.1 (2020) (citation omitted).

291. In connection with this analogy and its implicit dehumanization of noncitizens, see Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Doesn't See Asylum-Seekers as People*, SLATE (June 25, 2020, 3:35 P.M.), https://slate.com/news-and-politics/2020/06/supreme-court-asylum-deportations-thuraissigiam.html [https://perma.cc/W49P-W2XZ] (accusing "a majority of justices" of "thinking immigrants" are "faceless masses cynically manipulating America's generous asylum policy and overwhelming its immigration system" and who "do not deserve an iota of sympathy, let alone due process").

292. *Compare AOSI II*, 140 S. Ct. at 2087 n.1 (citation omitted), *with Hernández II*, 140 S. Ct. 735, 747 (2020) (characterizing U.S. border patrol as "a system of military discipline" to argue that national security is a "special factor" that bars blocking a boy's parents from suing for damages after the child was fatally shot by a border patrol agent). *But cf.* Quintero Perez v. United States, No. 17-56610, 2021 WL 3612108, at *8 (9th Cir. Aug. 16, 2021) (declining to decide if "foreign affairs" weighs against extending *Bivens* on facts similar to those of *Hernández II*).

293. Angeli Achrekar, *PEPFAR: Accelerating Progress to End AIDS in the Age of Covid-19*, U.S. DEP'T STATE (July 16, 2021), https://www.state.gov/dipnote-u-s-department-of-state-official-blog/pepfar-accelerating-progress-to-end-aids-in-the-age-

noncitizens seeking to invoke the Constitution extraterritorially, and for judges first encountering this doctrine, the impact of *AOSI II* on the bounds of the doctrine is yet to be determined.

The Court may have intended to firmly foreclose the extension of rights under the noncitizens' extraterritorial Constitution by deciding *AOSI II* on the basis of a bright-line rule and labelling it the bedrock principle. The Court has been prone to introduce its more abrupt, sweeping changes to the law with greater stealth, furthest from political controversy.[294] If the conservative majority, following Justice Kennedy's departure, sought to limit *Boumediene* "to its facts, effectively overruling [it] *sub silentio*," then *AOSI II* provided a more sensible vehicle than the *Hernández* litigation, which received news coverage in the international press for a decade, and in which both a foreign sovereign and U.S. Congress members submitted amicus briefs.[295]

However, as the discussion in this Note demonstrates, *AOSI II* has failed to firmly settle the already-muddled doctrine for when courts should apply the bedrock principle or some variation of *Boumediene* and/or

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of-covid-19/ [https://perma.cc/7JE5-8PK4] (quoting Secretary of State in the Biden administration Tony Blinken).

294. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 4, 9–10 (2010) (defining "stealth overruling" to include when "the Justices are—through disingenuous reasoning—depriving precedents of their force, "by . . . "limit[ing] an existing rule 'to its facts,' effectively overruling *sub silentio*"); *id.* at 33, 39–40 (describing the aim as avoiding "publicity attendant explicit overruling[,] . . . especially if it appears fueled by little else but a membership change on the Court," in order to avoid "decisions attracting broad, negative attention [, which] tend to encourage attacks and jeopardize the Court as an institution."); ROBERT M. MCCLOSKEY, THE AMERICAN SUPREME COURT 295 (6th ed. 2016) (1960) ("The court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation . . . .").

295. *See Mexico Worried by US Ruling over Boy's Border Killing*, BBC (Feb. 26, 2020), https://www.bbc.com/news/world-latin-america-51643636 [https://perma.cc/JJ72-UY6K]; Marc Lacey, *Border Shooting Strains Tensions with Mexico*, N.Y. TIMES (June 8, 2010), https://www.nytimes.com/2010/06/09/world/asia/09border.html (on file with the *Columbia Human Rights Law Review*); Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, *Hernández II*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3776030; *see also* Jennifer M. Chacón, *Past as Prelude: Immigration Jurisprudence After Anthony Kennedy*, 45 No. 8 PREVIEW 270 (noting "Justice Kennedy's absence may make it harder for [noncitizens] to prevail on [certain] claims"); Kent, *supra* note 191, at 204 ("[Perhaps the failure to address the extraterritoriality issue in *Hernández II* resulted . . . judicial minimalism; or a desire to avoid the doctrinal messiness of sorting out whether a cross-border shooting called for the extraterritorial application of the Constitution; or from concern about the optics of holding that a teenager shot dead by the U.S. Border Patrol lacked individual rights under the [U.S.] Constitution.").

Verdugo-Urquidez. As guidance on the current doctrinal landscape, this Note catalogues the existing proposals for construing *AOSI II*'s scope, and it analyzes both the merits and shortcomings of foregrounding the separation of powers analysis in the decision.

If *AOSI II*, *Hernández II*, and *Thuraissigiam* are read as a trilogy, there is little reason to suspect that the Court, as currently comprised, will extend constitutional rights for noncitizens in new contexts. In only one summer, the Court suggested the only place noncitizens can invoke the Constitution is within the United States, contrary to prior frameworks. It implicitly held that cross-border shootings from within the United States are extraterritorial, arguably contrary to traditional conflict of law rules; and it held that the Constitution regards noncitizens who enter twenty-five yards into the United States without authorization as if they were abroad.[296]

Judges will have opportunities to explore how noncitizens' extraterritorial rights under the U.S. Constitution may be preserved and extended after *AOSI II*. The modern decisions on the bounds of the noncitizens' extraterritorial Constitution—arguably beginning with *Reid* and certainly by *Verdugo-Urquidez*—arose once the United States' global presence expanded in the aftermath of World War II.[297] Global political trends will also render the doctrine more important over time. These issues grow increasingly significant and novel each year as globalization fosters a more interconnected world, conceptually complicating the bordered-nation state model of global governance, and politically reinforcing it by spurring backlash to globalization.[298] As such, the need for a consensus, cogent

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296. Commentators have identified similar thrusts in *AOSI II* and *Thuraissigiam*. *See* Tyler, *supra* note 178 ("The decisions in *Thuraissigiam* and [*AOSI II*] highlight that for at least five members of the current Supreme Court, the border and one's formal connection to the United States play an outsized role in constitutional analysis."); Arulantham & Cox, *supra* note 21 ("In [*AOSI II*] and *Thuraissigiam*, the Roberts Court has dramatically enhanced the government's power over noncitizens, going where prior . . . justices had been unwilling to go for decades. Whether or not one views this as a positive development, it is not the product of a restrained approach.").

297. *See* Neuman, *supra* note 5, at 965 ("American soldiers and . . . corporations had spread pervasively across the globe, and the exercise of prescriptive jurisdiction on the nationality principle had become more common."); Veneziano, *supra* note 2, at 609–10 (describing how this spread of U.S. law led Congress to begin to intend that "statutes, criminal enforcement procedures, [and] regulatory laws" apply abroad).

298. *See* Jeffrey Frieden, *The Backlash Against Globalization and the Future of the International Economic Order* 2–3 (Feb. 2018), https://scholar.harvard.edu/files/jfrieden/files/frieden_future_feb2018.pdf [https://perma.cc/WH9Y-L4YC] (describing how "scholars and other analysts have been discussing a globalization backlash for some 20 years"); Martin Wolf, *Will the Nation-State Survive Globalization?*, at 179, FOREIGN AFFS. (Jan./Feb. 2001) (predicting 20 years ago that "the modern form of globalization will not spell the end of the modern nation-state"), https://www.foreignaffairs.com/articles/2001-01-01/will-nation-state-survive-globalization/

understanding of the framework courts should apply if a noncitizen abroad seeks to invoke a given constitutional provision is likely to continue arising in diverse contexts. For the past century, lower courts have taken the lead in defining this field of law—and they will likely continue to do so. The impulse of each judge presiding over a case that tees up the issue may turn on their normative baseline: whether they, like a majority of the current Supreme Court, believe the word "purported" always and necessarily belongs in the following sentence as a matter of constitutional philosophy:

> If the [bedrock principle] were otherwise, actions by American military, intelligence, and law enforcement personnel against . . . foreign citizens in foreign countries would be constrained by the foreign citizens' *purported* rights under the U.S. Constitution.[299]

Judges who take no issue with the word "purported" and the implication of non-existence that it conveys will have it easy. At bottom, *AOSI II* can readily be understood as an invitation for courts to decline a serious inquiry into a noncitizen's claim to extraterritorial constitutional protection. Judges already have and certainly will continue to cursorily cite *AOSI II* to this end.

However, the decision's utility for those judges does not mean that the bedrock principle is settled law. The bounds of the noncitizens' extraterritorial Constitution were already unsettled prior to *AOSI II*, and *AOSI II* further unsettled it when the Court relied on the bedrock principle that wasn't. For judges who, following the lead of the Second and Ninth Circuits, can at least entertain the prospect that the Constitution may reach a noncitizen abroad.

(on file with the *Columbia Human Rights Law Review*); Peter S. Goodman, *A Global Outbreak Is Fueling the Backlash to Globalization*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/business/coronavirus-globalism.html (on file with the *Columbia Human Rights Law Review*) (detailing how the COVID-19 pandemic has raised questions about globalization's merits as businesses seek alternatives to making goods in China and extreme right-wing parties grow in popularity).

299. *AOSI II*, 140 S. Ct. 2082, 2086–27 (2020) (emphasis added).